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No.

IN THE

Supreme Court of the United States

October Term, 1983

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK STATE TAX COMMISSION, RODERICK A. CHU, Commissioner of Taxation and Finance, FRANCIS R. KOENIG, Commissioner of the New York State Tax Commission, and MARK FRIEDLANDER, Commissioner of the New York State Tax Commission,

Petitioners,

against

AIR TRANSPORT ASSOCIATION OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the New York State Court of Appeals

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Dated: July 25, 1983

Question Presented.

Whether States are preempted by the provision of section 1113 of the Federal Aviation Act (49 USC § 1513) from imposing on corporations principally engaged in aviation a franchise tax that includes in the yardstick for measuring the amount of tax liability gross earnings from the sale of air transportation of persons and of both interstate and intrastate freight transportation.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983.

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK STATE TAX COMMISSION, RODERICK A. CHU,* Commissioner of Taxation and Finance, FRANCIS R. KOENIG, Commissioner of the New York State Tax Commission, and MARK FRIEDLANDER, Commissioner of the New York State Tax Commission,

Petitioners,

against

AIR TRANSPORT ASSOCIATION OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the New York State Court of Appeals.

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the New York State Court of Appeals entered in this action on June 28, 1983. In addition, we request the case be argued together

*Roderick A. Chu succeeded James A. Tully, Jr., as Commissioner of Taxation and Finance.

with *Aloha Airlines, Inc. v. Director of Taxation, State of Hawaii* (No. 82-585) and *Hawaiian Airlines, Inc. v. Director of Taxation of the State of Hawaii* (No. 82-586).

Opinions Below.

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto at p A1. The opinion of the New York Supreme Court, Appellate Division, Third Department reported at 91 AD2d150, 458 N.Y.S.2d 602, and the opinions of the New York Supreme Court in Albany County, which are not reported, also appear in the Appendix hereto at pp A6-A11; A16-A22.

Jurisdiction.

The judgment of the New York State Court of Appeals was entered on June 28, 1983. This petition for certiorari is filed within 90 days from that date. This Court's jurisdiction is invoked under 28 USC § 1257(3).

Statutory Provisions Involved.

49 USC §1513, as amended by section 532 of the Airport and Airway Improvement Act of 1982,* (Pub L No. 97-248, 96 Stat 701) provides in pertinent part:

> "(a) No State * * * shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom * * * .

*This Act is Title V of the Tax Equity and Fiscal Responsibility Act of 1982.

"(b) Nothing in this section shall prohibit a State * * * from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services * * *."

Section 184 of the New York State Tax Law, as amended by chapter 486 of the New York Laws of 1981 provides in pertinent part:

"§ 184. Additional franchise tax on transportation and transmission corporations and associations.

"1. Every corporation, joint-stock company or association formed for or principally engaged in the conduct of aviation, surface railroad, whether or not operated by steam, subway railroad, elevated railroad, canal, steamboat, ferry (except a ferry company operating between any of the boroughs of the city of New York under a lease granted by the city), express, navigation, pipe line, transfer, baggage express, omnibus, trucking, taxicab, telegraph, telephone, palace car or sleeping car business, or formed for or principally engaged in the conduct of two or more of such businesses and every other corporation, joint-stock company or association formed for or principally engaged in the conduct of a transportation or transmission business not liable to taxation under section one hundred eighty-six of this chapter, for the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or

organized capacity or maintaining an office in this state, shall pay a franchise tax which shall be equal to three-quarters of one per centum upon its gross earnings from all sources within this state;

* * *

"4. Allocation of gross earnings from transportation and transmission services. —(a) Generally. A transportation or transmission corporation shall determine its gross earnings from transportation and transmission services within this state (except as otherwise provided for in this subdivision) by multiplying its gross earnings from transportation and transmission within and without the state by a fraction, the numerator of which is the taxpayer's mileage within this state and the denominator of which is the taxpayer's mileage within and without the state during the period covered by the report or reports required by this chapter.

"(b) Aviation corporations. An aviation corporation shall determine its gross earnings from transportation services within this state by multiplying its gross earnings from transportation services within and without this state by the arithmetical average of three ratios based on arrivals and departures, revenue tons handled and originating revenues during the period covered by the report or reports required by this chapter:

"(i) the ratio which the aircraft arrivals and departures within this state by any such corporation during the preceding calendar year bear to the total aircraft arrivals and departures within and

without this state during the same period; provided, however, arrivals and departures solely for maintenance or repair, refueling (where no debarkation or embarkation of traffic occurs), arrivals and departures of ferry and personnel training flights or arrivals and departures in the event of emergency situations shall not be included in such arrival and departure ratio; provided, further, the state tax commission may also exempt from such ratio aircraft arrivals and departures of all non-revenue flights including flights involving the transportation of officers or employees receiving air transportation to perform maintenance or repair services or where such officers or employees are transported in conjunction with an emergency situation or the investigation of an air disaster (other than on a scheduled flight); provided, however, that arrivals and departures of flights transporting officers and employees receiving air transportation for purposes other than specified above (without regard to remuneration) shall be included in computing such arrival and departure ratio;

"(ii) the ratio which the revenue tons handled by such corporation at airports within the state during the preceding calendar year bears to the total revenue tons handled by it at airports within and without this state during the same period; and

"(iii) the ratio which such corporation's originating revenue within this state for the preceding calendar year bears to its total originating revenue within and without this state for the same period. As used in this section the term

'aircraft arrivals and departures' means the number of landings and takeoffs of the aircraft of an aviation corporation, and the number of air pickups and deliveries by the aircraft of such corporation; the term 'originating revenue' means revenue to any such corporation from the transportation of revenue passengers and revenue property first received by such corporation either as originating or connecting traffic at airports and the term 'revenue tons handled' by any such corporation at an airport means the weight in tons, of revenue passengers (at two hundred pounds per passenger) and revenue cargo first received either as originating or connecting traffic or finally discharged by such corporation at such airport.

* * *

"(e) All other gross earnings, if any, shall be allocated to this state in the manner prescribed by rules and regulations promulgated by the tax commission.

"(f) With respect to other types of transportation and transmission corporations or where the tax commission decides that with respect to a certain corporation the method prescribed above does not fairly and equitably reflect gross earnings from all sources within this state, the tax commission shall prescribe methods of allocation or apportionment which fairly and equitably reflect gross earnings from all sources within this state. Also, the tax commission may, in order to properly reflect gross earnings, determine the report period in which any item of gross earnings shall be included without

regard to the method of accounting employed by a corporation taxable hereunder."

Statement of the Case.

Since 1935 the provisions of section 184 of the Tax Law have imposed a franchise tax measured by gross earnings on transportation and transmission corporations, including those principally engaged in aviation in New York. The tax originally excluded earnings derived from business of an interstate character. By chapter 486 of the Laws of 1981, the Legislature amended the section 184 franchise tax to include in the measurement of the tax gross earnings from all sources within New York. Gross earnings from sources within New York are determined by an allocation formula which was not challenged by the respondent. In 1973, Congress enacted section 1113 of the Federal Aviation Act, 49 USC §1513 ("section 1113") which prohibits States from imposing some taxes, but not franchise taxes, involving air commerce and air transportation.

The respondent, Air Transportation Association of America, is an unincorporated association which includes 21 corporations principally engaged in aviation in various States and New York and which are subject to the franchise tax imposed by section 184 of the New York Tax Law. Following the 1981 amendment of section 184 of the New York Tax Law, the respondent challenged the New York franchise tax in this proceeding as being violative of the Supremacy Clause of the United States Constitution. It asserts that section 184 violates the prohibitions of section 1113 of the Federal Aviation Act, stating that: (a) it imposes a tax on persons traveling in air commerce and on the air carriers' gross receipts derived therefrom; (b) it imposes a tax on the carriage of persons traveling in air commerce and on the air carriers' gross receipts derived

therefrom; and (c) it imposes a tax on the sale of air transportation and a tax on the air carriers' gross receipts derived therefrom.

On June 22, 1982, the New York Supreme Court in Albany County on reconsideration vacated its judgment dated May 1, 1982 and granted a judgment declaring:

> "that Subdivision 1 of Section 184 of the New York Tax Law, insofar as it imposes taxes on the gross receipts of air carriers derived from air carriage (other than on the gross receipts from freight services performed entirely in New York State), is unconsitutional by reason of Section 1113 of the Federal Aviation Act, 49 U.S.C. § 1513, and the Supremacy Clause of the United States Constitution."

The Appellate Division of the New York Supreme Court, Third Department, by decision of January 20, 1983 and an order dated January 27, 1983, affirmed the June 22, 1982 judgment. On June 28, 1983, the New York Court of Appeals affirmed the order of the Appellate Division for the reasons stated by Justice T. Paul Kane at the Appellate Division (see pp A8-A11 of Appendix). The courts below held that "the plain terms of section 1113 of the Federal Aviation Act strike directly at the subject tax, and do not allow for a construction which permits a tax either directly or indirectly on gross receipts derived from air transportation" (Appendix, p A10).

Reasons for Granting the Writ.

I.

The decision below conflicts with the decision of the Supreme Court of Hawaii in cases in which this Court has noted probable jurisdiction.

The court below, in holding that New York's franchise tax is preempted insofar as it applies to aviation corporations by section 1113 of the Federal Aviation Act, is in direct conflict with the decisions of the Hawaii Supreme Court in cases in which this Court has noted probable jurisdiction. *Aloha Airlines, Inc. v. Director of Taxation, State of Hawaii,* (No. 82-585) and *Hawaiian Airlines, Inc. v. Director of Taxation of the State of Hawaii* (No. 82-586). Those cases, in which New York has filed a brief *amicus*, are now awaiting argument. We request the Court to grant certiorari in this case and combine the argument with that in the Hawaii cases.

The decision below is not only in direct conflict with the cases arising from Hawaii, but it also brings an added dimension. The New York tax is a longstanding franchise tax on the privilege of doing business as a corporation. There is no dispute that the tax is indeed a franchise tax. The Hawaii tax has been treated as a property tax by the Hawaii courts, although its characterization as such is being challenged. Thus, this case clearly involves a tax specified in section 1113(b) of the Federal Aviation Act.

Moreover, this case presents an important and recurring issue. In addition to New York, Maryland imposes franchise taxes measured by gross receipts from air commerce which were in effect prior to the enactment of section 1113. Since 1920 Maryland has imposed a "franchise tax"

measured by gross receipts on all utilities and transportation companies. (Md Ann Code Art 81, § 130; chapter 226, 1929 Md Laws 621; see *Cumberland & P.R. Co. v. State*, 92 Md 668, 48 A2d 503, 507 [1901] [tax is franchise tax].) As far as we know, no airline has challenged the imposition of this tax in Maryland. And, of course, the interpretation of section 1113 of the Federal Aviation Act is of importance to many other States as this Court is aware from the *amici* briefs filed in the pending Hawaii cases. The New York franchise tax, as well as the taxes of other States measured by gross receipts on air commerce, represent a major revenue source.

II.

State franchise, property and net income taxes measured by gross receipts are not preempted by Section 1113 of the Federal Aviation Act.*

Simply reading subsections (a) and (b) of section 1113 of the Federal Aviation Act demonstrates a superficial ambiguity in the statute in that it permits States to levy property, franchise and income taxes while barring direct or indirect taxes on the gross receipts. However, the statute was not enacted in 1973 on a clean slate. It was written against a background of decisional law and state tax statutes, a background disregarded by the airlines and the Solicitor General in his *amicus curiae* brief in *Aloha Airlines, Inc. v. Director of Taxation, State of Hawaii* (No. 82-585) and *Hawaiian Airlines, Inc. v. Director of Taxation of the State of Hawaii* (No. 82-586). When the statute is examined in that historical context and its legislative history,

*Our reasons set forth here for believing that the court below erred in its interpretation of section 1113 of the Federal Aviation Act are essentially those discussed in our brief *amicus* in the cases arising from Hawaii.

the congressional intent becomes clear. As we will show, Congress did not intend to prohibit States from imposing franchise taxes measured by gross receipts on airlines and that conclusion is fully consistent with the statute's language, properly construed.

A. It had been well-settled when section 1113 of the Aviation Act was enacted in 1973 that including gross receipts as items that could be used as a measure for franchise and property taxes did not make them taxes on gross receipts.

At the time that section 1113 of the Federal Aviation Act was enacted in 1973, it was well established that States could use gross receipts as the *measure* of an otherwise constitutional tax, even though a tax imposed directly or indirectly on gross receipts might otherwise be invalid. See, Tribe, *Constitutional Law*, p 365.

Historically, franchise, as well as property, taxes based on gross receipts have been viewed as taxes on a local privilege or franchise or on property, the value of which is measured by receipts. Thus, such property taxes have been sustained. *Great Northern Railway Co. v. Minnesota*, 278 US 503 (1929). In *Pullman v. Richardson*, 261 US 330, 338, 339 (1923), the Court said:

> "[A] State may elect and employ any appropriate means of reaching its actual or full value as part of a going concern,—such as treating the gross receipts from its use in both intrastate and interstate commerce as an index or measure of its value,—and if the means do not involve any discrimination against interstate commerce and the tax amounts to no more than what would be legitimate as an ordinary tax upon the property,

> valued with reference to its use, the tax is not open to attack as restraining or burdening such commerce."

Similarly, gross receipts or gross earnings have simply constituted a "fair means of measuring a local privilege or franchise". *Western Livestock v. Bureau of Revenue*, 303 US 250, 256, 257 (1938); see, also, *Railway Express Agency v. Virginia*, 358 US 434, (1959). The cases also establish that a tax imposed on the privilege of exercising a corporate franchise measured by gross earnings, income or capital is neither a direct nor an indirect tax on gross earnings, income or capital of a corporation. It follows that a tax measured by gross income is not a direct or an indirect tax on gross income.

A tax on gross receipts has long been viewed as distinct from taxes measured by the gross earnings or receipts of a corporation and is also not an *indirect* tax on gross receipts included in the yardstick. See, e.g., *Werner Machine Co. v. Director of Taxation*, 350 US 492 (1956; *American Bank & Trust Co. v. Dallas County*, ____ US ____, 51 USLW 5181 (decided July 5, 1983). *Werner* involved the validity of a New Jersey franchise tax measured by a corporation's net worth. The taxpayer's net worth included obligations of the Federal government which are immune from state taxation under the provisions of 31 USC 742. The Federal statute provided at that time:

> "Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority."

This Court pointed out that this rule embraced "indirect taxation of such obligations through their inclusion in a tax imposed on all property of a taxpayer." But the Court in holding the franchise tax valid, said (350 US at p 494):

> "This Court has consistently upheld franchise taxes measured by a yardstick which includes tax-exempt income or property, even though a part of the economic impact of the tax may be said to bear indirectly upon such income or property. See, *e.g., Society for Savings v. Coite,* 6 Wall. 594; *Provident Institution v. Massachusetts,* 6 Wall. 611; *Hamilton Co. v. Massachusetts,* 6 Wall. 632; *Home Ins. Co. v. New York, supra; Educational Films Corp. v. Ward, supra; Pacific Co. v. Johnson, supra.* We have only recently adhered to this principle in another aspect of this field of taxation. See *Society for Savings v. Bowers, supra,* at 147-148. *New Jersey Realty Title Ins. Co. v. Division of Tax Appeals,* 338 U. S. 665, on which appellant relies, is distinguishable, in that it did not involve a franchise tax, but rather a tax whose legal incidence this Court found to be upon the intangible assets of the corporation.
>
> "Since as applied here this is a permissible tax on the corporate franchise, the decision below must be *Affirmed.*"

In *People v. Home Insurance Company.* 92 NY 328 (1883), affd 134 US 594 (1890), a franchise tax case, the measurement of the tax included interest on United States bonds and the amount invested in United States bonds was upheld. The New York court stated the issue as follows (*id.*, at 338-339):

> "It thus appears that the only question presented for our consideration under this branch of the appeal is whether the tax in question was in fact levied upon the franchises of the defendant, which would be undeniably lawful, or upon the property of the corporation invested in the securities of the general government, which would be unlawful. It is not claimed that the law in terms assumes to authorize the taxation of the exempted securities, but *it is asserted that it effects this result indirectly, and, therefore, amounts to the exercise of a prohibited power.*" (Emphasis supplied.)

In affirming the New York Court of Appeals, this Court in *Home Insurance Company v. New York,* 134 US 594, 600 (1890), said:

> "By the term 'corporate franchise or business,' as here used, we understand is meant (not referring to corporations sole, which are not usually created for commercial business) the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity * * * The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. *No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows* * * *" (Emphasis supplied.)

B. The legislative history of section 1113 of the Federal Aviation Act shows no intent to exclude States' franchise or property taxes using gross receipts as a measure from the taxes expressly permitted under section 1113.

Contrary to the decisions below, there is absolutely no basis for a conclusion that franchise, property and net income taxes were not within the taxes expressly protected by section 1113(b) of the Federal Aviation Act. As discussed above, it had long been held that using gross receipts as a measure for taxes did not mean such a tax was a tax on gross receipts, either directly or indirectly. Nothing in the Aviation Act's legislative history shows that Congress intended to ignore such interpretations. Accordingly, the restriction on direct or indirect taxes on gross receipts in section 1113(a) is simply not applicable to franchise, property or net income taxes.

1. An intent to preempt state taxes must be clearly shown by Congress.

When Congress speaks to proscribe the incidents on which state taxes may be imposed, it does so clearly and precisely. See, for example, the discussion in the annotation of 12 USCA 548, state taxation of national banks prior to 1973. It has long been recognized that "historic * * * powers of the States [are] not to be superseded" by Federal law, "unless that was the clear and manifest purpose of Congress". *Rice v. Santa Fee Elevator Corp.*, 331 US 218, 230 (1974); accord, e.g., *Ray v. Atlantic Richfield Co.*, 435 US 151, 157 (1978).

The complete absence of any reference in the Congressional history of section 1113 of the Federal Aviation Act, as we discuss below, to broad-based corporate franchise,

property or net income, such as the tax which was then being imposed by the State of New York, supports the view that Congress had not the remotest intent of including them within the state tax proscription Congress set up in subsection (a) of the Federal Act. To the contrary, Congress, in subsection (b), carefully preserved state franchise, property and income taxes. Congress, in the past, has spoken with clarity when it desired to proscribe a particular type of taxation. These are the very considerations discussed by this Court in *Sullivan v. United States,* 395 US 169 (1969). There the issue before the Court was whether Connecticut's sales and compensating use taxes were prohibited on sales to or uses by servicemen as a result of section 514 of the Soldiers' and Sailors' Civil Relief Act. This Court held that Congress never intended to bar state sales and use taxes (395 US at 178). Here, if Congress wished to prohibit taxes other than those "on the gross receipts" from the sale of air transportation, it could have said so clearly as it has done with other prohibitions of state taxes. Instead, it expressly protected property taxes, net income taxes, franchise taxes and sales or use taxes on the sale of goods or services without restriction.

It is clear, we submit, that Congress did not intend to preempt state taxes measured by gross receipts by subsection (a) of section 1113 of the Federal Aviation Act. In addition, the entire statute demonstrates that Congress reaffirmed the rights of States to have airlines pay for the privileges, protection and services which they and their property received from the states.

2. *The legislative history of section 1113 of the Federal Aviation Act shows no intent to preempt States from applying broad-based franchise and property taxes to airlines.*

Section 1113 of the Federal Aviation Act was enacted in response to the *Evansville-Vanderburgh Airport* case, 405 US 707, 721, 722 (1972). In that case, this Court upheld the validity of a city-imposed "use and service charge" of $1.00 on each enplaning commercial passenger at Evansville, Indiana, which was collected from the passenger, and a New Hampshire state law levying a $1.00 charge on the airline for each passenger on large commercial airlines, and 50 cents for each passenger on smaller planes. The Court ruled that States and cities could constitutionally impose a reasonable charge on interstate and intrastate air passengers where no Federal statute or specific congressional action evidenced a purpose to preempt state power.

The statements by the prime sponsors* when the bills were introduced, statements in the committee reports, and statements by managers and others on the floor of both

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*Though the Act was not enacted until 1973, an earlier version was passed by both Houses of Congress in 1972, but was pocket vetoed by President Nixon. See, 118 Cong Rec 35862 (Oct. 13, 1972) (Senate passage of Conference Report); *id.* at 35116 (Oct. 11, 1972) (House passage); *id.* at 37203 (announcement of pocket veto).

Senator Magnuson was one of the two prime sponsors in the Senate, see *id.* at 22598. Representative Adams sponsored legislation in the House and conducted most of the hearings on the various proposals. See, hearings on HR 2337, 14847, and 10326 (and identical bills) before the Subcommittee on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 92nd Cong, 1st Sess (1972).

The relevant legislative history of the Act spans two sessions of Congress.

houses confirmed that the prime impetus for the prohibitory language was to ban the proliferating head taxes and similar taxes directed against airlines.* This is further borne out by the 1982 amendment to the law, section 532 of the Airport and Aviation Improvement Act of 1982. At the same time, Congress intended to reconfirm to the States major sources of revenue.**

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*The Senate Commerce Committee stated in its report on the bill:

> "S.38 contains a prohibition on state taxation of passengers or on the carriage of passengers in air transportation. This prohibition will potentially deprive airport operators from a new and attractive source of revenue with which to support their airports—namely the passenger head tax."

S. Rep. 12, 93rd Cong., 1st sess. 11-12 (1973).

See, e.g., H. Rep. 1279, 92nd Cong., 2d sess. 2, 4 (1972); S. Rep. 1005, 92nd Cong., 2d sess. 20-25 (1972); S. Rep. 12, 93rd Cong., 1st sess. 4, 12, 17 (1973), H. Rep. 157, 93rd Cong., 1st sess. 2-3, 10 (1973); 118 Cong. Rec. 22599 (June 27, 1972) (remarks of Sen. Cannon), *id.* at 27815 (Aug. 10, 1972) (remarks of Sen. Cannon), *id.* at 27816 (remarks of Sen. Cotton), *id.* at 27826-27 (remarks of Sen. Hartke), *id.* at 27828 (remarks of Sen. Spong), *id.* at 29153 (Aug. 15, 1972) (remarks of Rep. Staggers); 119 Cong. Rec. 214 (Jan. 4, 1973) (remarks of Sen. Cannon), *id.*, at 3928 (Feb. 8, 1973) (remarks of Rep. Adams), *id.* at 13898 (May 2, 1973) (remarks of Rep. Staggers), *id.* at 13899 (remarks of Rep. Kuykendell), *id.* at 13900 (remarks of Rep. Jarman), *id.* at 13905 (remarks of Rep. Adams).

**The senior staff counsel for the Ways and Means Oversight Subcommittee of the United States House of Representatives wrote:

> "The approach taken by the Airport Development Acceleration Act broadly restricts states from imposing taxes or 'other charges' with respect to air commerce, but exempts from this broad restriction certain types of taxes such as property, income, franchise, and sales or use taxes. The exempted taxes are, of course, the major revenue sources for states and, accordingly, the Act effectively balances national interests and those of the states' revenue needs with respect to air commerce."

PARNELL, *Constitutional Considerations of Federal Control Over the Sovereign Taxing Authority of the States*, 28 Cath UL Rev 227, 246 (1979).

The clearest congressional statement of the intent and scope of section 1113 of the Federal Aviation Act is found in Senate Report 12, 93rd Congress. In its discussion of the state tax prohibition, the Report states:

> "[The bill prohibits] a new, inequitable and potentially chaotic burden of taxation on the nearly 200 million persons who use air transportation each year. The legislation prohibits the levying of state or local head taxes, fees or charges either on passengers or on the carriage of such passengers in interstate commerce. The provision is in response to a situation which has been brought about by an April 19, 1972 Supreme Court decision in *Evansville-Vanderburg Airport Authority District, et al. v. Delta Airlines, Inc., et al.*, upholding passenger head taxes enacted by New Hampshire and by Evansville, Indiana, for 'aviation-related purposes'. While this decision has invited state and local governments to enact head taxes or fees on air travelers, the Court decision does not provide adquate [*sic*] safeguards to prevent undue or discriminatory taxation." (US Code Congressional and Admin News, 93rd Cong, 1st Session, Vol 1, p 1446.)

Throughout the report, the type of tax primarily discussed is a passenger head tax, whether paid directly by the passenger or absorbed by the carrier.* The tax is described in the report as a flat rate on passengers, regardless of the distance traveled by the passenger.

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*Taxes paid primarily by persons who can shift the burden someone else or who are under no legal compulsion to pay them are considered indirect taxes. Taxes on the ultimate consumer whose payment cannot be avoided are direct taxes. See 71 Am Jur 2d, State and Local Taxation, § 19.

In regard to subsection (b) of section 1113, which makes clear other state taxes are not prohibited, the Conference Report states:

> "The Senate bill also provided that *the prohibition would not extend to* the levy or collection of *other taxes, such as property taxes,* net income taxes, *franchise taxes,* and sales taxes, and sales or use taxes, nor to the levy or collection of other charges such as reasonable rental charges, landing fees, and other services charges from aircraft operators for the use of airport facilities." (Conference Report No. 930225, found in US Code Congressional and Admin News, 93rd Cong, 1st Session Vol 1, p 1458.) (Emphasis supplied.)

If Congress had intended to prohibit franchise taxes which are measured by gross receipts from the sale of air transportation that part of subsection (b) permitting franchise taxes would be a mere surplusage and meaningless. There is no language other than that contained in section 1113(a) which conceivably could be construed as preempting States from imposing franchise taxes measured by gross receipts. That being so, section 1113(b) would have no meaning if it were construed, as the courts below and the airlines would have it, as protecting franchise taxes not measured in some way by gross receipts. It is clear that even a franchise tax measured by net income would literally be a direct or indirect tax on gross receipts. Indeed, section 1113(b) treats income taxes and franchise taxes the same way in recognition that neither type of tax was intended to be preempted.

The legislative history of the Federal Act found in the Subcommittee Hearings and Reports is replete with discussions of the limited scope of the state tax prohibition intended by Congress (Subcommittee on Transportation and

Aeronautics of the Committee on Interstate and Foreign Commerce, House of Representatives, Ninety-Second Congress, 2nd Session, on HR 2337, HR 14847 and HR 10326, Serial No. 92-74 [hereinafter referred to as "Subcommittee hearings, Ninety-Second Congress"] and Ninety-Third Congress, 1st Session, on HR 4082, *et al.*, Serial No. 93-6 [hereinafter referred to as "Subcommittee hearings, Ninety-Third Congress"]).

In the hearings there is limited discussion of a unique Ohio Airlines excise tax. The concern of the Subcommittee and of the industry witnesses was the proliferation of discriminatory, selective state taxes in the form of the *Evansville* type of taxation or the Ohio Airlines excise tax.

The Ohio excise tax on airlines read as follows:

> "Section 5745.02. *Tax imposed on transporting by air.*—For the purpose of providing revenue for the use of the general revenue fund of the state * * * an excise tax is hereby imposed upon the privilege of engaging in the business of transporting persons, or property by air within this state." (Emphasis supplied.)

The measure of the Ohio tax was four (4) percent of the receipts derived from or attributable to business carried on within Ohio.

Theodore Koetz, then Ohio Deputy Tax Commissioner, testified before the Congressional subcommittee on considering the Federal Aviation Act stated:

> "We have an airlines excise tax in Ohio which is unique, and we are probably the only state in the 50

states that has such a tax. (p. 246 of Subcommittee Hearings, Ninety-Third Congress).

"The Ohio tax structure may be unique in reference to airlines. Most businesses in Ohio, be they domestic or foreign, intrastate or multistate, are amenable to a *franchise tax* and a personal property tax * * * However, the airlines are fully subject only to the corporate franchise tax. [And a less burdensome property tax and the airlines excise tax.]" (Emphasis supplied, p 247.)

The Ohio Supreme Court when examining the Ohio airlines excise tax had clearly distinguished the Ohio franchise tax (which as applied to airlines may include receipts from the sale of air transportation in the calculation of its base) from the Ohio Airlines excess tax as follows in *United Airlines v. Portersfield,* 276 NE2d 629, 635 (1971), app dsmd 401 US 917 (1972):

"R.C. 5733.01, Ohio's corporation franchise tax statute, provides, in pertinent part:

'* * * the tax * * * for foreign corporations shall be [1] for the privilege of doing business in this state, [2] owning or using a part or all of its capital or property in this state, or [3] holding a certificate of compliance with the laws of this state authorizing it to do business in this state during the calendar year in which such fee is payable.'

"United is subject to the tax provided for by that statute, measured, in part, by the amount of the receipts from airline passenger tickets issued in Ohio for both intrastate and interstate flights. See *American Airlines v. Porterfield* (1970), 21 Ohio St. 2d 272.

> "We mention the franchise tax to clearly reveal that we are mindful that *the tax in issue in the instant case is not another franchise tax on the right to do business in Ohio* in the corporate form of organization, and that the airline tax is not levied in lieu of other state taxes." (Emphasis supplied.)

Mr. Tipton, the Chairman of the Air Transporation Association of America, Inc., described the Ohio tax in his testimony at the Transportation and Aeronautics Subcommittee Hearings on section 1113 (Ninety-third Congress, First Session) at page 98, as follows:

> "Particularly dangerous, burdensome, and discriminatory in our judgment is one state's imposition of a tax on the gross receipts derived from *the sale of interstate air transportation—a so-called airlines excise tax.* This tax is levied at a rate of 4 percent on airline receipts in that state 'for the privilege of engaging in the business of transporting persons or property by air.' "

He did not voice any objection to taxes measured by gross receipts. The state tax prohibition of subsection [a] initially considered by the Ninety-Second Congress contained the prohibition of a state or local tax on: [1] "persons traveling in air commerce" and [2] "the carriage of persons in air transportation" (HR 14847, p 2, lines 18-22; HR 2337; p 1, lines 6-9). The legislative history indicates that the language "on the sale of air transportation or on the gross receipts derived therefrom" added to the final text of section 1113 was directed specifically at Ohio's airlines excise tax. With the addition of this language,

subsection (b) was added to assure and reaffirm state taxing power. It circumscribed the taxes prohibited by subsection (a), specifically describing certain taxes, including franchise taxes, that were not preempted.*

Interestingly, one of the sponsors of Senate Bill 3755, 92nd Cong, which included section 1113 of the Federal Aviation Act as enacted, was Senator Magnuson from the State of Washington. Representative Adams, also from the State of Washington, sponsored the legislation in the House. It is doubtful that they intended to preempt Washington's nondiscriminatory tax on airlines and other utilities and carriers.**

It is also significant that Congress has been mindful of the long-established difference between taxes and their measurement. Thus, when it amended 31 USC § 742 in 1959, which prohibits state taxes on Federal obligations, it not only preserved non-discriminatory franchise taxes but, unlike the present statute, also overcame the measurement distinction for certain other taxes by extending the exemption to situations where certain Federal obligations were used in the *computation* of the tax. *American Bank &*

---

*In November, 1973, the State of Ohio, *sua sponte*, in an opinion by its Attorney General, declared that Ohio's airline excise tax "must be discontinued because it conflicts with section 1113 of the Federal Aviation Act." The opinion is not expansive and did not elaborate on the reasoning which led to the legal conclusion. It is, however, consistent with both the language and history of the Aviation Act, as we have discussed.

**The Committee on Transportation and Aeronautics included Congressman Bertram L. Podell of New York. The Committee on Interstate and Foreign Commerce included Congressmen Bertram L. Podell, James F. Hastings and Norman F. Lent of New York and Goodloe E. Byron of Maryland. These Committees held the hearings on section 1113 of the Federal Aviation Act.

Trust Co. v. Dallas County, supra, ____ US ____, 51 USLW 5181, 5183-5184 (1983). That section now provides:

> "Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. *This exemption extends to every form of taxation* that would require *that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax,* except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes." (Emphasis supplied.)

The purpose behind that amendment is stated in the Bill's legislative history, 59 US Code Cong & Admin News, pp 2773-2774, as follows:

> "D. CLARIFYING EXEMPTION OF U.S. OBLIGATIONS FROM STATE OR LOCAL TAXATION
>
> "Present law provides that obligations of the United States are to be exempt from taxation by or under State or local authority. The Supreme Court has held that this includes the exemption of interest on U. S. obligations from taxation by or under State or local authority. It has been pointed out to your committee, however, that one State has taken the position that the statute as now worded does not prohibit a State from including interest on Federal obligations in computing 'gross income' upon which taxable net income is determined. The

> bill (sec. 105) makes it clear that the exemption for Federal obligations extends to every form of taxation that would require either the obligation, or the interest on it, or both to be considered directly or indirectly in the computation of the tax, *except nondiscriminatory franchise taxes* (or other nondiscriminatory nonproperty taxes imposed in lieu thereof) on corporations and except estate or inheritance taxes." (Emphasis supplied.)

The present statute again preserves franchise, property and net income taxes. We submit that Congress expressly intended to exempt these three types of taxes, even though gross receipts are used as a measure.

CONCLUSION.

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals of the State of New York and this case should be argued with *Aloha Airlines, Inc. v. Director of Taxation, State of Hawaii* (No. 82-585) and *Hawaiian Airlines, Inc. v. Director of Taxation of the State of Hawaii* (No. 82-586).

Dated: Albany, New York
July 25, 1983

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioners

PETER H. SCHIFF
Acting Attorney in Chief
Appeals and Opinions

FRANCIS V. DOW
Assistant Attorney General
of Counsel

APPENDIX

APPENDIX.

Decision of the Court of Appeals, Dated June 28, 1983.

No. 326

AIR TRANSPORT ASSOCIATION OF AMERICA,

Respondent,

v.

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, *et al.*,

Appellants.

Order affirmed, with costs, for reasons stated in the opinion by Justice T. Paul Kane at the Appellate Division (91 AD 2d 169).

Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Meyer and Simons concur.

Remittitur.

COURT OF APPEALS,

STATE OF NEW YORK.

The Honorable Lawrence H. Cooke, Chief Judge, Presiding.

No. 326

AIR TRANSPORT ASSOCIATION OF AMERICA,

Respondent,

v.

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, *et al.*,

Appellants.

The appellants in the above entitled appeal appeared by Hon. Robert Abrams, Attorney General; the respondent appeared by Debevoise & Plimpton, Esqs.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs, for reasons stated in the opinion by Justice T. Paul Kane at the Appellate Division (91 AD2d 169). Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Meyer and Simons concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Albany County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

Court of Appeals, Clerk's Office, Albany, June 28, 1983.

JOSEPH W. BELLACOSA
Clerk of the Court

Order, Dated January 27, 1983.

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 13th day of December, 1982.

Present:

Hon. T. Paul Kane,
Justice Presiding,
Hon. Ann T. Mikoll,
Hon. Paul J. Yesawich, Jr.,
Hon. Leonard A. Weiss,
Hon. Howard A. Levine,
Associate Justices.

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—THIRD DEPARTMENT

AIR TRANSPORT ASSOCIATION OF AMERICA,

Plaintiff-Respondent,

v.

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK STATE TAX COMMISSION, JAMES H. TULLY, Jr., Commissioner of Taxation and Finance, FRANCIS R. KOENIG, Commissioner of the

New York State Tax Commission, and MARK FRIEDLANDER, Commissioner of the New York State Tax Commission,

Defendants-Appellants.

#43719
Albany County Clerk's Index No. 11450-81

Appellants New York State Department of Taxation and Finance, New York State Tax Commission, James H. Tully, Jr., Commissioner of Taxation and Finance, Francis R. Koenig, Commissioner of the New York State Tax Commission, and Mark Friedlander, Commissioner of the New York State Tax Commission, having appealed from a judgment of Albany County Supreme Court, Special Term, entered on the 22nd day of June, 1982, in the office of the Clerk of the County of Albany, and said appeal having been presented during the above-stated term of this Court, and having been argued by Francis V. Dow, Esq., of counsel for appellants, and by Andrew C. Hartzell, Jr., Esq., of counsel for respondent, and, after due deliberation, the Court having rendered a decision on the 20th day of January, 1983, it is hereby

ORDERED that the judgment appealed from be affirmed, without costs.

Dated and Entered: January 27, 1983.

JOHN J. O'BRIEN
Clerk

A True Copy
JOHN J. O'BRIEN
Clerk

Opinion of the Appellate Division, Third Department, Dated January 20, 1983.

January 20, 1983 43719

AIR TRANSPORT ASSOCIATION OF AMERICA,

Respondent,

v.

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, *et al.*,

Appellants.

Judgment affirmed, without costs.
Opinion per Kane, J. P.
Mikoll, Yesawich, Jr., Weiss and Levine, JJ., concur.

Opinion of the Appellate Division, Third Department.

STATE OF NEW YORK, SUPREME COURT,

APPELLATE DIVISION—THIRD DEPARTMENT.

AIR TRANSPORT ASSOCIATION OF AMERICA,

Respondent,

against

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE *et al.*,

Appellants.

#43719

Argued, December 14, 1982.

Before:

Hon. T. Paul Kane,
Justice Presiding,
Hon. Ann T. Mikoll,
Hon. Paul J. Yesawich, Jr.,
Hon. Leonard A. Weiss,
Hon. Howard A. Levine,
Associate Justices.

Appeal from a judgment of the Supreme Court at Special Term (DeForest C. Pitt, J.), entered June 22, 1982 in Albany County, which, *inter alia,* granted plaintiff's motion for reargument, and, upon reargument, declared section 184 (subd. 1) of the New York State Tax Law to be unconstitutional.

Robert Abrams, Attorney-General (Francis V. Dow of counsel), for appellants, The Capitol, Albany, New York, 12224.

Debevoise & Plimpton (Andrew C. Hartzell of counsel), for respondent, 299 Park Avenue, New York, New York 10171.

Opinion for Affirmance.

KANE, J. P.

Plaintiff is an unincorporated trade and service association consisting of 31 air carriers, 21 of whom do business in New York State. In this declaratory judgment action, plaintiff contends that section 184 (subd. 1) of the New York State Tax Law imposes a tax that is prohibited by section 1113 of the Federal Aviation Act (U. S. Code, tit. 49, § 1513) and is, therefore, unconstitutional under the supremacy clause (art. VI, cl. 2) of the United States Constitution.

Section 1113 of the Federal Aviation Act provides, in pertinent part, that:

(a) No State * * * shall levy or collect a tax, fee, head charge, or other charge, *directly or indirectly,* on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or *on the gross receipts derived therefrom* * * * (emphasis added).

(b) Nothing in this section shall prohibit a State * * * from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services * * *.

Section 184 (subd. 1) of the Tax Law provides, *inter alia,* that:

> Every corporation * * * formed for or principally engaged in the conduct of aviation * * * for the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity, or maintaining an office in this state, *shall pay a franchise tax which shall be equal to three-quarters of one per centum upon its gross earnings from all sources within this state* (emphasis added).

Special Term found that section 184 (subd. 1) of the Tax Law, while called an "additional franchise tax", was *inter alia,* "in fact a tax upon the gross receipts from sale of air transport services" and that section 1113 of the Federal Aviation Act forbids such a tax. This being the case, Special Term declared section 184 (subd. 1) of the Tax Law unconstitutional. This appeal ensued.

Defendants' central argument is that the gross earnings of section 184 (subd. 1) are not entirely composed of gross receipts from the sale of air coverage, but have other components. As such, defendants assert that the franchise tax in question, which includes gross receipts in its measurement, is permissible and, therefore, not in conflict with section 1113 since subdivision (b) of that section explicitly permits the levy of franchise taxes.

This argument must be rejected. In our opinion, the plain terms of section 1113 of the Federal Aviation Act strike directly at the subject tax, and do not allow for a construction which permits a tax either directly or indirectly on gross receipts derived from air transportation. Moreover, legislative history, evidenced by the various forms of the bills and hearing testimony, supports our reading of section 1113 of the Federal Aviation Act. In particular, Congress refused to adopt a suggestion by the State of Ohio to add language to subdivision (b) of section 1113 which would have permitted State taxation of fairly apportioned air carrier gross receipts (see Hearings Before the Subcommittee on Transportation and Aeronautics, House Committee on Interstate and Foreign Commerce, 93rd Congress, First Session).

In November, 1973, the Ohio Attorney-General issued an opinion declaring the Ohio excise tax discussed above to be in conflict with section 1113, as that section "prohibits both direct and indirect state taxation of the sale of air transportation" (Ohio Attorney-General Opn. No. 73-117). We would also note that the Court of Appeals of Arizona has held that a transaction privilege levy imposed by Arizona on air carriage measured by gross receipts of sales was impermissible as it conflicted with, and was thus preempted by, section 1113 (*State ex rel. Arizona Dept. of Revenue v. Cochise Airlines*, 626 P 2d 596 [Ariz.]).

Defendants argue that the New York franchise tax challenged herein is distinguishable from both the Ohio tax and Arizona tax. We, however, are unable to find any meaningful distinction. The language of section 184 (subd. 1) also refers to "privilege", and defendants' argument that the measurement of the challenged tax by gross earnings is distinguishable from a direct tax on gross receipts is without substance. In this regard, the fact that section 184 (subd. 1) of the Tax Law imposes a tax on other categories of income does not alter the fact that it imposes a tax upon the gross receipts derived from air carriage.* Finally, defendants' contention that to construe the Federal statute as prohibiting the use of gross receipts in determining franchise taxes would render meaningless the explicit provision in section 1113 (sub. [b]) permitting the levy of franchise taxes by States is specious, since the measurement for the franchise tax could be structured in a different way (but see *Matter of Aloha Airlines, Inc.*, 647 P 2d 263 [Hawaii], U.S. S. Ct. app. pending).

We would, therefore, agree with Special Term that section 184 (subd. 1) of the Tax Law is preempted by the subject Federal statute insofar as gross earnings are measured by gross receipts from air carriage. Special Term's judgment must, therefore, be affirmed.

The judgment should be affirmed.

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*Plaintiff does not challenge the tax on other categories of income.

Judgment of Pitt, J., Dated June 22, 1982.

At a Special Term, Part I, of the Supreme Court of the State of New York, County of Albany, held at the Albany County Courthouse, Albany, on the 3rd day of June, 1982.

Present:

Honorable DeForest C. Pitt, Justice.

AIR TRANSPORT ASSOCIATION OF AMERICA,

Plaintiff,

against

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK STATE TAX COMMISSION, JAMES H. TULLY, Jr., Commissioner of Taxation and Finance, FRANCIS R. KOENIG, Commissioner of the New York State Tax Commission, and MARK FRIEDLANDER, Commissioner of the New York State Tax Commission,

Defendants.

Index No. 11450-81

Plaintiff having moved the Court by notice of motion dated February 12, 1982, for summary judgment pursuant to Rule 3212 of the Civil Practice Law and Rules; plaintiff's motion for summary judgment having come on to be heard on March 26, 1982; the Court having rendered a decision dated April 15, 1982, denying plaintiff's motion for summary judgment and granting summary judgment in favor of defendants; the Court having entered a Judgment dated May 1, 1982, granting summary judgment in favor of defendants; plaintiff having moved this Court by notice of motion dated May 14, 1982, for reconsideration of the Court's decision; plaintiff's motion for reconsideration having come on to be heard on June 3, 1982; and this Court having rendered a decision dated June 10, 1982, granting plaintiff's motion for reconsideration and its motion for summary judgment, a copy of which is annexed hereto.

NOW, upon the complaint dated December 2, 1981; the answer dated December 30, 1981; plaintiff's notice of motion for summary judgment dated February 12, 1982; the Affidavit of Robert Glasser sworn to February 8, 1982; plaintiff's memorandum in support of its motion for summary judgment dated February 12, 1982, and the appendices annexed thereto; the Affidavit of Paul B. Coburn in opposition to plaintiff's motion for summary judgment sworn to March 12, 1982; defendants' memorandum in opposition to plaintiff's motion for summary judgment dated March 12, 1982; plaintiff's reply memorandum in support of its motion for summary judgment dated March 25, 1982, and the appendix annexed thereto; the arguments by counsel for the parties on March 26, 1982; defendants' memorandum dated April 8, 1982, and the exhibits annexed thereto, responding to plaintiff's reply memorandum; plaintiff's notice of motion for reconsideration dated May 14, 1982; plaintiff's memorandum in

support of its motion for reconsideration dated May 14, 1982, and the appendices annexed thereto; defendants' letter in response to plaintiff's motion for reconsideration dated June 1, 1982; and the arguments by counsel for the parties on June 3, 1982; and after due deliberation thereon; it is hereby

ORDERED that plaintiff's motion for reconsideration is granted; and it is

FURTHER ORDERED that the Court's Judgment dated May 1, 1982, is vacated; and it is

FURTHER ORDERED, ADJUDGED and DECREED that plaintiff's motion for summary judgment pursuant to Rule 3212 of the Civil Practice Law and Rules is granted; and it is

FURTHER ORDERED, ADJUDGED and DECREED that Subdivision 1 of Section 184 of the New York Tax Law, insofar as it imposes taxes on the gross receipts of air carriers derived from air carriage (other than on the gross receipts from freight services performed entirely in New York State), is unconstitutional by reason of Section 1113 of the Federal Aviation Act, 49 U.S.C. § 1513, and the Supremacy Clause of the United States Constitution; and it is

FURTHER ORDERED, ADJUDGED and DECREED that defendants and all persons in active concert and participation with them are permanently enjoined from assessing, determining, imposing or collecting from plaintiff's members any tax pursuant to Subdivision 1 of Section 184 of the New York Tax Law on the gross receipts derived from air carriage (other than on the gross receipts from

freight services performed entirely in New York State); and it is

FURTHER ORDERED that plaintiff is entitled to recover its costs herein incurred.

Dated: Albany, New York
June 22, 1982

Enter:

S/ DEFOREST C. PITT
J.S.C.

Memorandum Opinion of Pitt, J., Dated June 10, 1982.

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF ALBANY.

AIR TRANSPORT ASSOCIATION OF AMERICA,

Plaintiff,

against

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK STATE TAX COMMISSION, JAMES H. TULLY, Jr., Commissioner of Taxation and Finance, FRANCIS R. KOENIG, Commissioner of the New York State Tax Commission, and MARK FRIEDLANDER, Commissioner of the New York State Tax Commission,

Defendants.

(Supreme Court, Albany County Special Term, June 3, 1982.)
(Hon. DeForest C. Pitt, Presiding)
(No. 158)

Appearances:

Debevoise & Plimpton, Esqs., Attorneys for Plaintiff. (Andrew C. Hartzell, Jr., Philip S. Winterer & Steven Klugman, Esqs., of Counsel.)

Robert Abrams, Attorney General, State of New York, Attorney for Defendants. (Lawrence L. Doolittle, Asst. Atty. Gen., of Counsel.)

PITT, J.

The plaintiff, the Air Transport Association of America, has moved for reargument of the decision and order of this Court which found application of section 184 of the New York Tax Law constitutional and not within the prohibition of section 1113 of the Federal Aviation Act.

This Court found that section 184 of the Tax Law was in fact a tax upon the gross receipts from the sale of air transport services. The Court looked to the legislative history to determine that such tax was not barred by the Federal Aviation Act because the tax was not in any way discriminatory. Upon reargument the plaintiff has shown that the Court misinterpreted section 1113 of the Federal Aviation Act. In its original decision the Court held that if sales taxes were allowed on the sale of air transportation then certainly franchise taxes would be allowed. The Court then looked at the problems which section 1113 of the Federal Aviation Act addressed and determined that since section 184 of the Tax Law was not discriminatory that it would not be barred by said section.

The legislative drafting history of section 1113 of the Federal Aviation Act clearly shows that Congress did not intend to allow sales taxes on the sale of air transportation. Furthermore, such drafting history shows that the language of subdivision b of section 1113, which states "nothing herein shall prohibit a state . . . from the levy or collection of taxes *other than those enumerated in subsection (a) of this section,*" (emphasis added) was intended to bar any type of tax based upon the gross receipts derived from the sale of air transportation.

Since this Court mistakenly implied a requirement that taxes be discriminatory to be barred by section 1113 of the Federal Aviation Act and since it is now determined from the legislative history that said section imposes an absolute bar on any taxes upon gross receipts from the sale of air transportation, it is the determination of this Court that section 184 of the New York State Tax Law is in violation of such prohibition and is unconstitutional pursuant to the supremacy clause of the United States Constitution.

The plaintiff's motions for reargument and for summary judgment declaring that subdivision (1) of section 184 of the New York State Tax Law unconstitutional are therefore granted in all respects.

Submit order.

Dated: Troy, N. Y.
June 10, 1982.

(All papers to the Attorneys for Plaintiff.)

Memorandum Opinion of Pitt, J., Dated April 15, 1982.

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF ALBANY.

AIR TRANSPORT ASSOCIATION OF AMERICA,

Plaintiff,

against

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK STATE TAX COMMISSION, JAMES H. TULLY, Jr., Commissioner of Taxation and Finance, FRANCIS R. KOENIG, Commissioner of the New York State Tax Commission, and MARY FRIEDLANDER, Commissioner of the New York State Tax Commission,

Defendants.

(Supreme Court, Albany County Special Term, March 26, 1982.)
(Hon. DeForest C. Pitt, Presiding)
(No. 13)

Appearances:

Debevoise and Plimpton, Esqs., Attorneys for Plaintiff. (Andrew C. Hartzell, Jr.; Philip S. Winterer and Stephen Klugman, Esqs., of counsel.)

Robert Abrams, Attorney General, State of New York, Attorney for Defendants. (Lawrence L. Doolittle, Asst. Atty. Gen. of counsel.)

PITT, J.

Memorandum

The plaintiff, The Air Transport Association of America, an unincoporated trade and service association consisting of 31 air carriers, has moved for summary judgment declaring subdivision 1 of section 184 of the New York Tax Law unconstitutional insofar as it seeks to tax the gross receipts of plaintiff's member air carriers.

The defendants have raised the issue of whether the plaintiff association has standing to challenge section 184 of the Tax Law because it does not pay any taxes pursuant to said section. However, the complaint alleges that the association members are subject to the tax and have paid such tax and that such taxes amount to millions of dollars each year. These allegations are sufficient to give the plaintiff standing to sue, (*Boston Stock Exchange v. State Tax Com.* 429 U.S. 318.)

The complaint alleges that subdivision 1 of section 184 of the Tax Law violates the supremacy clause of the United States Constitution because said section of the Tax Law imposes a tax upon the gross receipts from the sale of air transport services in violation of section 1113 of the Federal Aviation Act, (49 U.S.C. section 1513.) This section of the Federal Aviation Act prohibits the states from levying or collecting taxes based upon the gross receipts derived from the sale of air transportation. Subdivision 1 of section 184 of the New York State Tax Law taxes every corporation engaged in aviation three quarters of one percent of its gross earnings from all sources within the State. Said subdivision calls the tax a "franchise tax".

The defendants contend that the tax challenged herein is a franchise tax and as such it is allowed by section 1113(b) of the Federal Aviation Act. The defendants also contend that since the tax in question covers all earnings from every source that it does not constitute a gross receipts tax barred by the Federal Aviation Act.

That the tax challenged herein is based upon gross receipts is made clear by the affidavit of Paul B. Coburn submitted in opposition to the plaintiff's motion for summary judgment. Such affidavit demonstrates the operation of the tax in question with a hypothetical example of an aviation corporation. Such corporation is taxed on interest income, the sale of a plane, rental income, income from refueling services and ticket sales for passenger transportation. Gross earnings pursuant to subdivision 1 of section 184 of the Tax Law include all of the interest income, only the capital gains income from the sale of the plane, and all rental income. The amount received for refueling operations is reduced by the cost of the fuel. Income from ticket sales is taxed in full without reduction for the cost of providing the air transportation service. Thus section 184 of the Tax Law includes a tax on air carriers on the gross receipts from ticket sales for air transportation.

However, to apply section 1113 of the Federal Aviation Act to bar the tax in question would lead to inconsistent results and would make the statute irrational, or at least ambiguous. Subdivision b of section 1113 allows franchise taxes and sales taxes. This court cannot conceive of a sales tax which is not directly or indirectly a tax on the gross earnings from sales. Furthermore, such sales taxes can amount to substantial sums of money, for example, 7% at the Albany County Airport. This exceeds many of the taxes barred by section 1113.

Since the statutory language is inconsistent and ambiguous, the court must look to its legislative history to determine the legislative intent. Such history shows that the statute was enacted to bar discriminatory taxes levied solely against airlines in addition to normal franchise taxes and other taxes. Section 184 of the Tax Law levies a franchise tax on all transportation carriers based upon gross earnings. The plaintiff has failed to show that this tax, in effect since 1880, is in any way discriminatory. As such it is not barred by section 1113 of the Federal Aviation Act.

The motion for summary judgment in favor of the plaintiff is denied in all respects. Since it appears that section 184 of the Tax Law is constitutional, the defendants are granted summary judgment pursuant to rule 3212(b) of the CPLR.

Submit Judgment.

Dated: Troy, N. Y.
April 15, 1982.

No. 83-162

Office-Supreme Court, U.S.
FILED
SEP 28 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK STATE TAX COMMISSION, RODERICK A. CHU, Commissioner of Taxation and Finance, FRANCIS R. KOENIG, Commissioner of the New York State Tax Commission, and MARK FRIEDLANDER, Commissioner of the New York State Tax Commission,

Petitioners,

—VS.—

AIR TRANSPORT ASSOCIATION OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Does Section 1113 of the Federal Aviation Act, 49 U.S.C. § 1513, which prohibits state taxes on gross receipts from air carriage, bar New York's franchise tax on air carriers insofar as it is based on gross receipts from air carriage?*

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* This petition raises issues related to those in *Aloha Airlines, Inc. v. Director of Taxation, State of Hawaii*, No. 82-585, and *Hawaiian Airlines, Inc. v. Director of Taxation of the State of Hawaii*, No. 82-586, which are scheduled for argument before this Court on October 4, 1983.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-162

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK STATE TAX COMMISSION, RODERICK A. CHU, Commissioner of Taxation and Finance, FRANCIS R. KOENIG, Commissioner of the New York State Tax Commission, and MARK FRIEDLANDER, Commissioner of the New York State Tax Commission,

Petitioners,

—VS.—

AIR TRANSPORT ASSOCIATION OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 59 N.Y.2d 917, and the opinion of the Appellate Division, Third Department, at 91 A.D.2d 169, 458 N.Y.S.2d 709.

STATUTES INVOLVED

Section 1113 of the Federal Aviation Act, 49 U.S.C. § 1513, provides in pertinent part:

> "(a) No State . . . shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom . . . .
>
> "(b) Nothing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services . . . ."

Section 184(1) of the New York Tax Law provides in pertinent part:

> "Every corporation . . . formed for or principally engaged in the conduct of aviation . . . for the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity, or maintaining an office in this state, shall pay a franchise tax which shall be equal to three-quarters of one per centum upon its gross earnings from all sources within this state . . . ."

COUNTERSTATEMENT OF THE CASE

Respondent Air Transport Association of America is an unincorporated trade and service association of 31 airlines, and petitioners are the principal taxing authorities of New York State. Respondent challenged the constitutionality of the tax imposed by Section 184(1) of the New York Tax Law on its members' gross receipts from air carriage, on the ground that such tax is prohibited by Section 1113 of the Federal Aviation

Act and therefore is unconstitutional under the Supremacy Clause of the United States Constitution. The New York Supreme Court, Albany County, at Special Term initially ruled for petitioners but, on reargument, ruled for respondent. The judgment was unanimously affirmed both by the Appellate Division of New York Supreme Court, Third Department, and by the New York Court of Appeals.

A. Federal Law

In 1970, Congress enacted two statutes as part of "a comprehensive program substantially to expand and improve the national airport and airway system." *Massachusetts v. United States*, 435 U.S. 444, 447 (1978). The Airport and Airway Development Act of 1970, Pub. L. No. 91-258, 84 Stat. 219 ("Development Act"), established the Airport and Airway Trust Fund to dispense Federal funds for airport and airway development. The Airport and Airway Revenue Act of 1970, Pub. L. No. 91-258, 84 Stat. 236 ("Revenue Act"), provided for new and increased federal taxes on air carriage to support the Trust Fund. These taxes were

> "an 8% tax on the price of domestic air passenger tickets, see Revenue Act, § 203, 26 U.S.C. § 4261; a $3 'head tax' on international flights originating in the United States, *ibid.*; and a 5% tax on the cost of transporting property by air, Revenue Act, § 204, 26 U.S.C. § 4271."

Massachusetts v. United States, *supra*, 435 U.S. at 451. The taxes were imposed to implement a "national system" of airport and airway development "funded in large part by uniform Federal taxes." S. Rep. No. 12, 93d Cong., 1st Sess. 26 (1973), *reprinted in* 1973 U.S. Code Cong. Adm. News 1434, 1455.

In 1973, Congress supplemented the 1970 legislation by the Airport Development Acceleration Act, Pub. L. No. 93-44, 87 Stat. 88 ("Acceleration Act"), which increased the federal government's portion of airport funding. As part of the Acceleration Act, Congress added Section 1113 to the Federal

Aviation Act. Section 1113 prohibits state and local taxes on gross receipts from air carriage on top of the uniform federal taxes.

B. New York Tax

Section 184 of the New York Tax Law has long taxed the intrastate gross receipts of transportation companies, including airlines. In 1981, the statute was amended to tax interstate gross receipts as well.

C. Respondent's Claim

Section 1113 prohibits state taxes "directly or indirectly" on the gross receipts from air carriage. Respondent claims that a tax based on such gross receipts cannot escape the prohibition by being labeled a "franchise tax." If that were permitted, Section 1113 would be a nullity and the plain purpose of Congress in enacting it would be thwarted. New York's tax on the gross receipts from air carriage is therefore prohibited.

D. Decisions Below

On respondent's motion for summary judgment, New York Supreme Court at Special Term initially held that the New York tax was permitted by Section 1113 (Appendix to Petition ("A-__") at A-19). On respondent's motion for reargument, the court concluded that its initial decision was in error and that the tax was prohibited (A-16).

In affirming, the Appellate Division stated:

> "In our opinion, the plain terms of section 1113 of the Federal Aviation Act strike directly at the subject tax, and do not allow for a construction which permits a tax either directly or indirectly on gross receipts derived from air transportation."

(A-10).

The Court of Appeals affirmed based on the opinion of the Appellate Division (A-1).

SUMMARY OF ARGUMENT

Section 1113 is clear on its face and should be enforced according to its terms. It prohibits state taxes "directly or indirectly" on gross receipts from air carriage, and it would violate the language of the statute as well as Congress' purpose in enacting it to permit gross receipts taxes simply because they are labeled "franchise taxes" by state legislatures. The decision below was therefore correct and the petition should be denied.

ARGUMENT

I

Section 1113 Prohibits New York's Tax on the Gross Receipts from Air Carriage.

Section 1113 provides in pertinent part:

> "(a) No State . . . shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom . . . ."

This language covers virtually every method by which a state might try to dodge the federal prohibition and add a state tax on the same revenues that are subject to the federal taxes.

First, Section 1113 reaches all forms of state taxation by prohibiting any "tax" (normally a percentage of a certain amount), any "fee" (normally a flat amount per unit of measure), and any "head charge" (a fee per person). It then includes the words "or other charge" to ensure against evasion of the prohibition by the use of some other label.

Second, the statute broadly defines what cannot be taxed: (1) "persons traveling in air commerce," (2) "the carriage of persons traveling in air commerce," (3) the "sale of air transportation," or (4) "the gross receipts derived therefrom."

Congress plainly intended that air travel, and its economic measure, gross receipts, not be taxed by the states because they are already subject to federal taxation.

Third, the statute includes the words "directly or indirectly" to bar taxes, however labeled, which impact on air carriage at the gross receipts level where the federal taxes apply.

To make it clear that the prohibitions of subsection (a) did not apply to taxes other than those impacting at the gross receipts level, Congress added a subsection (b) to Section 1113:

> "(b) Nothing in this section shall prohibit a State . . . from the levy or collection of taxes *other than those enumerated in subsection (a)* of this section, including property taxes, *net* income taxes, franchise taxes and sales or use taxes on the sale of goods or services . . . " (emphasis added).

Thus if a tax is not "enumerated" in subsection (a), it is not prohibited. The states remain free, for example, to impose sales and use taxes so long as they are not based on the sale of air carriage, or to impose franchise taxes so long as they are not based on the gross receipts from air carriage.[1] They are also free to impose *net* income taxes.

New York contends that subsection (a) does not prohibit a tax if the taxing state calls it a "franchise" or "property" tax because these labels bring it within subsection (b). If that were true, subsection (b) would be a roadmap for nullifying subsection (a). The "other than" language in subsection (b) defeats New York's contention. The franchise and property taxes referred to as permissible in subsection (b) are those based on *net* income or surplus or asset values—that is, based on

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1 Franchise taxes are often based on net worth, net income, or some measure other than gross receipts. *See American Bank & Trust Co. v. Dallas County*, ___ U.S. ___, 51 U.S.L.W. 5181, 5184 (July 5, 1983). In fact, New York's general corporate franchise tax is based on net income and other factors, not on gross receipts. New York Tax Law Art. 9-A, §§ 208 *et seq.*

measures "other than" gross receipts from air carriage. Subsection (b) is explicitly subordinated to subsection (a), not vice-versa.

Nor are the subsections ambiguous, as New York contends. As demonstrated above, they are clear, consistent with one another, and logical as written and in their application.

II

The Legislative History Confirms Congress' Intention to Prohibit State Taxes on the Gross Receipts from Air Carriage.

" 'Absent a clearly expressed legislative intention to the contrary, [the statutory] language must ordinarily be regarded as conclusive.' " *American Bank & Trust Co. v. Dallas County, supra*, 51 U.S.L.W. at 5183, *quoting Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The legislative history of Section 1113 does not indicate an intention contrary to the statutory terms. Indeed, it further illuminates Congress' intention to prohibit state taxes based on gross receipts from air carriage.

A. The Legislative History

1971. On January 6, 1971, only months after passage of the Development Act and the Revenue Act, the first version of what later became Section 1113 was introduced in the House. It provided in relevant part:

> "No State . . . shall levy or collect a tax, fee, or other charge, directly or indirectly, on the carriage of persons in air transportation . . . ."[2]

No action was taken on the bill in 1971.

1972. In early 1972, Congress began a review of the airport development program. Shortly after the Senate commenced

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2 H.R.2337, 92d Cong., 1st Sess. (1971).

hearings, this Court in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (April 19, 1972), held that the Development Act did not prevent states from imposing "head taxes" on air passengers or on air carriers. *Evansville* focused attention on the need to prohibit state taxes imposed on top of the 1970 federal taxes.

On May 9 and 16, 1972, two identical bills were introduced in the House. In obvious response to *Evansville*, these added to the 1971 bill the language emphasized below:

> "No State . . . shall levy or collect a tax, fee, or other charge, directly or indirectly, on *persons traveling in air transportation or* the carriage of persons in air transportation . . . ."[3]

On June 27, 1972, a comprehensive bill on airport development funding was introduced in the Senate.[4] This bill included the following expanded language prohibiting state taxes:

> "No State (or political subdivision thereof) shall levy or collect a tax, fee, head charge or other charge, directly or indirectly, on persons traveling in air transportation or the carriage of persons in air transportation, *or on the gross receipts derived therefrom*, provided, however, that nothing herein shall prohibit a State (or any political subdivision thereof) from the levy or collection of taxes *other than those enumerated above*, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services (*other than on the sale of interstate air transportation or any portion thereof*); and further provided, that nothing herein shall prohibit a State (or political subdivision thereof) owning or operating an airport from the levy or collection of reasonable rental charges, landing fees and other service charges for the use of airport facilities (*measured on other than a per-passenger basis*)." (emphasis added)

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3 H.R.14847 and H.R.14991, 92d Cong., 2d Sess. (1972).

4 S.3755, 92d Cong., 2d Sess. (1972).

The phrase "or on the gross receipts derived therefrom" was added after the Vice Chairman of the Civil Aeronautics Board told the Senate Subcommittee on Aviation about an Ohio tax on "the gross receipts of airline business done in Ohio."[5] Just as it broadened the bill to prohibit head taxes after *Evansville*, Congress broadened the bill to prohibit gross receipts taxes after learning of the Ohio tax.

An explanatory phrase, providing that certain taxes "other than those enumerated above" were permitted, also appeared for the first time and as part of the same paragraph containing the basic prohibition. A common-sense reading of the explanatory phrase compels the conclusion that it was not intended to contradict the prohibitions a few lines earlier in the bill.

The same is true of the additional language that permits "sales or use taxes on the sale of goods or services (other than on the sale of interstate air transportation or any portion thereof) . . . ." The parenthetical phrase shows that the only sales and use taxes permitted were those *other than* on the sale of air transportation.[6] The reference to such permissible taxes was never intended to undermine the broad prohibition on enumerated taxes.

The bill was considered by the Senate Commerce Committee in executive session on June 28, 1972, and was "favorably

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5 *Hearings on S.2397, S.3302, S.3611, and S.3755 Before the Subcomm. on Aviation of the Senate Committee on Commerce*, 92d Cong., 2d Sess. 136-40 (April 25-June 12, 1972).

6 This was the point on which the trial court erred in its initial ruling (A-19). The court thought that since sales taxes were permitted by subsection (b), and since such taxes were always on gross receipts, then, by parallel reasoning, if franchise taxes were permitted by subsection (b), franchise taxes could also be on gross receipts. After the above language on sales taxes was pointed out to the trial court on respondent's motion for reargument, the court recognized that sales taxes on air carriage were not permitted by subsection (b), and it therefore also recognized that franchise taxes on gross receipts were similarly not permitted by subsection (b) (A-16).

reported with one substantive and numerous technical or drafting amendments." S. Rep. No. 1005, 92d Cong., 2d Sess. 7 (1972). As the report explained, the substantive amendment related to airport development grants, which are not relevant here; the other amendments were of a "technical or drafting nature and do not reflect substantive changes in the bill." *Id.*

The "technical or drafting" changes, insofar as they related to what became Section 1113, included dividing the single paragraph into subsections (a) and (b), and eliminating two of the three "other than" phrases in subsection (b). These phrases were undoubtedly dropped as redundant in view of the initial "other than" phrase which was retained. The retained phrase excludes from permissible taxes under subsection (b) any taxes "enumerated" in subsection (a). The statute as so revised was identical to Section 1113 as enacted a year later, in June 1973.[7]

1973. In 1973, the bill that the Conference Committee had agreed on in 1972 was reintroduced as S.38.[8] Senator Pearson explained the prohibition on state taxes:

> "Finally, Mr. President, the committee bill prohibits State and local *taxation of air fares*. The Congress intended in 1970 to preempt the States and localities from levying such taxes, as *taxation on air fares* is one of the predominant sources of revenue for the trust fund. Recent Supreme Court decisions necessitate the clarification of this congressional policy determination.
>
> "If more than 500 localities—or even a significant proportion of this number—were unilaterally to levy taxes

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7 On October 5, 1972, a Conference Report stated that the Senate bill was acceptable to the House. H.R. Rep. No. 1543, 92d Cong., 2d Sess. 3 (1972). The Senate and the House both passed the bill, but it was pocket-vetoed by President Nixon on October 27, 1972. The veto was of the entire legislation, for reasons unrelated to the state tax prohibition provisions. *See* 119 Cong. Rec. 3348, 3350 (1973).

8 S.. Rep. No. 12, 93d Cong., 1st Sess. 26 (1973), *reprinted in* 1973 U.S. Code Cong. & Adm. News 1455.

on *airline passenger fares*, there would result an unconscionable and unacceptable burden on interstate commerce."

119 Cong. Rec. 3350 (1973) (emphasis added).

In March 1973, during hearings by the House Subcommittee on Transportation and Aeronautics, Theodore Koetz, Deputy Tax Commissioner of Ohio, sought to exempt from the bill's prohibition the Ohio gross receipts tax on airlines. He proposed that the language emphasized below be added to subsection (b):

> "(b) Nothing herein shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, sales or use taxes on the sale of goods or services, *privilege or excise taxes, and gross receipts taxes fairly apportioned to a State* . . . ."[9]

Congress rejected this proposal, further indicating its intention to bar any tax on gross receipts from air carriage.

The subcommittee's discussion with Commissioner Koetz shows clearly its awareness of the issue:

> "MR. SHOUP. One final question, Mr. Chairman.
>
> "I was interested in your answer to Mr. Dingell's question, whether this was a gross receipts tax. I fail to understand why this is not a gross receipts tax.
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> "MR. KOETZ. Well, we start off with the total gross receipts of the airline and then break them down only to the in and out of Ohio's portion.

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9 *Airport Development Acceleration Act of 1973: Hearings on H.R.4082, H.R.2695, H.R.4213, H.R.4214, H.R.4182, and S.38 Before the Subcomm. on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce*, 93d Cong., 1st Sess. 248-49 (March 14-27, 1973).

"MR. SHOUP. But it is based on the gross receipts?

"MR. KOETZ. It is based on the gross receipts attributable to Ohio, origination-destination.

"MR. DINGELL. If the gentleman will yield: then it is a gross receipts tax. It either is an excise tax or it is a gross receipts tax. And I do not think calling it an excise tax is going to make it; so, to be perfectly frank with you. This is either an excise tax or a gross receipts tax.

"So really, you have a gross receipts tax, and the only difference between this and a regular gross receipts tax, for example, on an airline doing business, would be that you would simply say: 'OK fellows, we are only going to charge you on that portion of the business which is done inside the State of Ohio.'

"But the Federal Constitution would prohibit you from levying a tax on business that is done outside the State of Ohio anyway."[10]

In commenting on the Ohio tax, Congressman Shoup stated:

"I think the problem we have here on the committee on the head tax is not the fact that revenues being raised for a very needed use, but the fact that we made these decisions some years ago that we would take a national view of it, not individual.

"And it would seem to me that this type of tax [the Ohio tax] does not differ from a head tax; that each State and each community, if we can justify Ohio's, would be able to add their own excise tax, which I can't see differs from a head tax."[11]

After these hearings, the bill with the state tax prohibition was passed by Congress and signed by the President on June 18, 1973.

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10 *Id.* at 251-52.

11 *Id.* at 250.

B. Congress' Intention

This legislative history demonstrates Congress' intention to prohibit state taxes on top of the federal taxes on air carriage. Senator Cannon stated that such taxes would be a "form of double taxation which we did not intend when, in 1970, we enacted a national system of aviation user taxation." 119 Cong. Rec. 3349 (1973). It is important to note that the federal taxes collected under the 1970 legislation are not lost to the states; instead, they are deposited in the Trust Fund, from which they are distributed to the states for use in the development and improvement of airports and airways. In requiring air carriage to bear the burden of these federal taxes, it was fair and logical for Congress to prohibit states and localities from imposing additional taxes on the same gross receipts subject to federal tax.

The franchise, property and other taxes referred to in subsection (b), therefore, are valid only if based on a measure "other than" air carrier gross receipts. This is the only sensible and logical reading of the statutory language and of the legislative history.

New York contends that Congress' purpose was a narrow prohibition of state head taxes in response to *Evansville*. That view is contradicted by the statutory language, which Congress could easily have limited to head taxes if that were all it intended to prohibit, and by the legislative history. Furthermore, the contention ignores the fact that this legislation was first introduced more than a year *before Evansville*. Although the enactment later of an expanded version of Section 1113 was partly motivated by that decision, the legislative history shows that Congress intended, before *Evansville* and after, to bar all state taxes imposed on top of the federal taxes.

III

The New York Tax Is Not Saved by Labeling It a "Franchise Tax."

New York's principal argument is that Section 1113 prohibits only taxes "on" gross receipts and not franchise taxes "measured by" gross receipts. The courts below correctly found this distinction irrelevant to the application of Section 1113.

A. The New York Tax Is on Gross Receipts.

There can be no dispute that the New York tax is based on gross receipts from air carriage. Although Section 184(1) uses the words "gross earnings" instead of gross receipts, virtually the entire tax is based on gross receipts from air carriage.[12]

B. The Franchise Tax Label Is Irrelevant under Section 1113.

Subsection (a) prohibits taxes "directly or indirectly" on the gross receipts from air carriage. The Section 184(1) tax may be a franchise tax. However, it is also, for purposes of Section 1113, a tax on gross receipts.[13] It is based on gross receipts,

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12 The State's tax form, a copy of which is in Respondent's Appendix at RA-1, demonstrates the operation of the tax. Line 91 on page 4 lists "Aviation" followed by a column for "Gross Receipts," part to be allocated to New York (RA-4). Page 3 of the Instruction Sheet, referring to line 91 of the "Gross Receipts" column, states: "*Enter total gross receipts earned from aviation services* everywhere and multiply by the allocation percentage for aviation corporations . . ." (emphasis added) (RA-7).

The tax is also imposed on other categories of airline income, such as interest on bank accounts and rental income. Respondent does not challenge the tax on these other categories, but New York cannot save a prohibited tax by adding to it other—and here minor—permissible taxes.

13 The characterization of the tax under Section 1113 is a question of federal, not state, law. *Chase Manhattan Bank v. Finance Administration*, 440 U.S. 447, 449 (1979).

rises and falls with gross receipts, and does not exist if there are no gross receipts. A common-sense reading of Section 1113 makes it, for purposes of that statute, a tax on gross receipts. If not a direct tax, it is certainly an indirect tax on gross receipts.

New York asserts that the tax is imposed only "on" the franchise and not "on" gross receipts, and that gross receipts are merely the measure. But Section 1113 prohibits a tax so measured. Subsection (a) refers not only to the persons and activity the states are barred from taxing (*i.e.*, air travellers, air carriage and the sale thereof) but also to the measure the states are barred from using (*i.e.*, a measure based on gross receipts). It unambiguously extends its prohibition to all state taxes that "directly or indirectly" are on gross receipts, without any exception based on labels.[14]

If New York were correct, subsection (a)'s prohibitions could be ignored any time a state labeled its tax a "franchise tax." It could then base the tax on gross receipts from air carriage or even on the number of passengers entering or leaving aircraft. Obviously, Congress did not intend that result.

C. New York's Reliance on Commerce Clause and Federal Obligations Cases Is Misplaced.

New York relies on the distinction drawn in older Commerce Clause cases between taxes "on" the corporate franchise, which were permitted although measured by the volume of interstate business, and taxes "on" interstate business, which were prohibited as burdening interstate commerce.

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14 The prohibition is further illustrated by the provision in subsection (b) that "*net* income taxes" are permissible. There would have been no reason to include in subsection (b) any description of taxes by measure—*i.e.*, net income taxes—if subsection (a) had not prohibited taxes by measure—*i.e.*, gross receipts taxes. The provision that *net* income taxes are permissible merely emphasizes that *gross* receipts taxes are not.

There is not the slightest hint in Section 1113's legislative history that Congress had that distinction in mind when it enacted Section 1113. On the contrary, subsection (a) describes the prohibited taxes in terms of their impact, not their labels, and bars any charge on the business of air carriage or the volume of that business represented by its gross receipts—that is, any charge against the top line, so to speak. That is where the federal taxes apply, and Congress intended to prohibit additional state taxes at that level. It would defeat that purpose if such a tax could be imposed by calling it a franchise tax and adopting the economically meaningless distinction drawn from the older Commerce Clause cases.[15]

Permitting such a tax would render meaningless the reference to "gross receipts" in subsection (a)'s prohibitory language. For it is not plausible to suggest that Congress prohibited gross receipts taxes like the Ohio tax, but intended to permit taxes with precisely the same economic consequences like the New York tax. There is a fundamental difference between a gross receipts tax and the types of taxes permitted by subsection (b). A gross receipts tax because of its top-line impact is a charge on the air carriage business itself. A tax on the owner's net receipts from operations (*i.e.*, net income) or on his surplus, capital or property (*i.e.*, the assets used in the business) is entirely different. Consistent with the congressional purpose, the federal taxes impose a charge on the air carriage business itself, for Congress intended that business to bear a significant part of the expense of airport and airway development. But it also intended to bar similar state charges.

The distinction in the older Commerce Clause cases was an attempt to accommodate state taxes to the general rule that the states could not directly tax interstate commerce. In applying Section 1113, however, the question is not how to accommodate a state tax to the general requirements of the Commerce

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15 This Court has recognized that the distinction is without practical significance and has no current relevance even in Commerce Clause cases. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

Clause, but how to apply an express act of Congress whose *sole* purpose is to prohibit particular state taxes. Even if it were at one time justifiable in the Commerce Clause context, the distinction relied on by New York cannot logically be applied to nullify the plain command of Section 1113.[16]

New York's reliance on the federal obligation cases is similarly misplaced. For many years prior to 1959, 31 U.S.C. § 742 provided that federal obligations were "exempt from taxation."[17] The State of Idaho imposed a tax "on every individual measured by his net income," including income from federal obligations, and attempted to avoid § 742 by arguing that the tax was "on" the individual rather than "on" his income. Stating that this was "a distinction of words which is without substance,"[18] the Eisenhower Administration in 1959 proposed, and Congress adopted, the following statutory clarification:

> "This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except non-discriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes."

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16 New York mistakenly relies on implicit preemption cases in arguing that no intent to preempt state law should be inferred: Section 1113 explicitly preempts state law, and there is no need to infer an intent to preclude. The only question is whether the federal law applies to the state tax in issue, and in deciding that question the federal law is to be construed in a way that is "faithful not only to [the] statute but also to the expressed intent of Congress in enacting it." *Arizona Public Service Co. v. Snead*, 441 U.S. 141, 150 (1979); *see also Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 152-53 (1982).

17 *See American Bank & Trust Co. v. Dallas County, supra*, 51 U.S.L.W. at 5182 n.1.

18 *Public Debt Ceiling and Interest Rate Ceiling on Bonds: Hearings on H.R. 9035 before the Committee on Ways and Means*, 86th Cong., 1st Sess. 71 (1959).

Prior to this amendment, this Court in *Werner Machine Co. v. Director of Division of Taxation*, 350 U.S. 492 (1956), had permitted a state franchise tax measured by a yardstick which included tax-exempt federal bonds. The Court recognized, however, that the impact of such a tax "may be said to bear *indirectly* upon such income or property" (emphasis added). *Id.* at 494. And, as the Court recently stated in *American Bank & Trust Co. v. Dallas County, supra*, 51 U.S.L.W. at 5184, such a tax "takes into account, at least *indirectly*, the federal obligations that constitute a part of the bank's assets" (emphasis added). Section 1113, by its express terms, prohibits taxes which are "directly or indirectly" on the gross receipts from air carriage. By any reading, the New York tax is such a tax.[19]

IV

Except for the Hawaii Decision, Other Authorities Support Respondent's Position.

New York points out that the decision below conflicts with the Hawaii Supreme Court decision in *Aloha Airlines, Inc. v. Director of Taxation, State of Hawaii*, No. 82-585, and *Hawaiian Airlines, Inc. v. Director of Taxation of the State of Hawaii*, No. 82-586, which this Court has scheduled for argument on October 4, 1983.[20]

We submit that the Hawaii Supreme Court's decision was erroneous. First, the Hawaii Supreme Court wrongly concluded there was an ambiguity between subsections (a) and (b) because, while the former barred taxes "directly or indirectly"

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19 New York argues that the exception for non-discriminatory franchise taxes in the amendment to § 742 supports its argument that a similar exception was intended by Section 1113(b). This argument ignores the fact that subsection (b) only applies to taxes "other than those enumerated in subsection (a)." No such subordination is found in § 742.

20 *In re Aloha Airlines, Inc.*, 65 Haw. 1, 647 P.2d 263 (1982), *prob. juris. noted*, ___ U.S. ___, 103 S.Ct. 721 (Jan. 10, 1983).

on gross receipts, the latter permitted property taxes which the court stated were "ordinarily derived from the 'gross receipts' of airlines." *In re Aloha Airlines, Inc.*, *supra*, 647 P.2d at 270. The court ignored the "other than those enumerated" language of subsection (b), which eliminates any ambiguity and makes the subsections consistent. Second, the court gave no attention to the legislative history discussed at pp. 7-12, *supra*, which shows the clear and consistent relationship between the two subsections. Finally, the court mistakenly concluded that Section 1113 prohibited only ticket taxes on passengers and shippers, not taxes on airlines. This conclusion is contrary to the language and legislative history of the section. It would render meaningless most of the language of subsection (a), especially the prohibition against taxes on gross receipts, which are necessarily receipts of the carrier.

Other authorities are consistent with the decision of the New York courts. In *State of Arizona v. Cochise Airlines*, 128 Ariz. App. 432, 626 P.2d 596 (1980), an Arizona appellate court held that an Arizona "transaction privilege tax" based on "the gross proceeds of sales or gross income from the business . . . [of air carriage]," Ariz. Rev. Stat. § 42-1310, was invalid under Section 1113. Like New York, Arizona argued that Section 1113 prohibited only "head taxes," but the court reviewed both the statutory language and legislative history and concluded that the scope of the prohibition is much broader. The Arizona tax was functionally indistinguishable from the New York tax. Although not labeled a franchise tax, it was a privilege tax measured by gross receipts. The same meaningless argument could be made that the tax was on the privilege and not on the gross reciepts.

Similarly, the Ohio Attorney General in a 1973 opinion concluded that Ohio's privilege tax based on gross receipts was prohibited by Section 1113. Ops. Ohio Att'y Gen. No. 73-117 (1973). Based primarily on a functional analysis of the impact of the tax, that opinion stated:

> "The language of [Section 1113] is clearly inclusive of the Ohio Airlines Excise Tax [Ohio Rev. Code § 5745.02)

> which by its terms falls within the category of a tax upon the gross receipts derived from the sale of air transportation."[21]

Finally, in *Wien Air Alaska, Inc. v. State of Alaska, Department of Revenue*, No. 3 AN 81-8582 Civ. (Alaska Super. Ct., 3d Dist. May 3, 1983), an Alaska court ruled that Section 1113 barred the application of the Alaska Business License Tax to Wien's carriage of passengers and mail and to its interstate, foreign or overseas carriage of freight. The Alaska tax, Alaska Stat. §§ 43.70.020 *et seq.* (repealed in 1978), was not a franchise tax but a license tax based on gross receipts for the "privilege of engaging in a business in the State . . . ."

As the opinion of the Appellate Division in the present case concluded (A-11):

> "Defendants argue that the New York franchise tax challenged herein is distinguishable from both the Ohio tax and Arizona tax. We, however, are unable to find any meaningful distinction. The language of Section 184 (subd. 1) also refers to 'privilege,' and defendant's argument that the measurement of the challenged tax by gross earnings is distinguishable from a direct tax on gross receipts is without substance."

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21 New York incorrectly asserts that there is an Ohio franchise tax on airlines that "may include receipts from the sale of air transportation in the calculation of its base." (Petition at 22). The Ohio franchise tax, Ohio Rev. Code §§ 5733.05 and 5733.06, is based on capital surplus and reserves (net worth) or on *net* income. Since the tax is not on gross receipts, it is not invalid under Section 1113. New York's misunderstanding stems from its misreading of *United Air Lines, Inc. v. Porterfield*, 276 N.E.2d 629 (Ohio 1971), *appeal dismissed*, 407 U.S. 917 (1972), which states that, in determining what portion of a corporation's net worth or net income is allocable to Ohio, gross receipts are a component of the denominator of the allocation fraction. But the tax is on *net* worth or *net* income allocated to Ohio, not on *gross* receipts.

CONCLUSION

For the reasons stated, the decision below was correct and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 28, 1983

RESPONDENT'S APPENDIX

CT-183/184

Article 9
Sections
183 and 184

STATE OF NEW YORK
FRANCHISE TAX REPORT
on
Capital Stock and Gross Earnings
BY TRANSPORTATION AND TRANSMISSION CORPORATIONS AND ASSOCIATIONS

1982

OFFICIAL USE ONLY

DATE RECEIVED

New York State Tax Department

For the calendar year ended December 31, 1982 or

File with: Processing Unit, P.O. Box 1909, Albany, N.Y. 12201 on or before **March 15, 1983**

EMPLOYER IDENTIFICATION NUMBER | FILE NUMBER

NAME

CHECK IF CHANGED SINCE LAST REPORT OR IF LABEL IS INCORRECT ☐ ADDRESS ☐ EMPLOYER NO.

NUMBER AND STREET

MAKE CORRECTION ON LABEL.

CITY OR TOWN | STATE | ZIP CODE

FOR AUDIT USE ONLY

STATE OR COUNTRY OF INCORPORATION | TELEPHONE | DATE OF INCORPORATION | DATE BEGAN BUSINESS IN NYS

PRINCIPAL BUSINESS ACTIVITY | IS THE CORPORATION ORGANIZED UNDER N.Y.S. TRANSPORTATION CORPORATION LAW? ☐ - YES ☐ - NO | BUSINESS GROUP CODE NUMBER PER FEDERAL RETURN •

IMPORTANT – COMPLETE ALL LINES MARKED • USE ZEROS WHERE THEY APPLY.

REMIT AMOUNT SHOWN AT LINE 17 - MAKE CHECK PAYABLE TO: NEW YORK STATE CORPORATION TAX → $ | REMITTANCE •

SCHEDULE A - TAX COMPUTATION		A SECTION 183	B SECTION 184
1. Tax on allocated issued capital stock from Schedule E, Line 62	1	$	
2. Tax on Dividends from Schedule F, Line 81 or Line 85	2		
3. Minimum Tax	3	75 00	
4. Tax on Gross Earnings from Schedule H, Line 104	4		$ •
5. Tax on Dividends from Schedule I, Line 110	5		•
6. TAX DUE: Column A - Amount from Lines 1, 2 or 3, whichever is largest. Column B - Line 4 or Line 5	6		
7. Less: Additional Mortgage Recording Tax Credit - Attach Form CT-43	7	•	•
8. Total: Subtract Line 7 from Line 6	8	•	•
9. First Installment for calendar year 1983 (Section 184 only) 25% of Line 8, Col. B if tax exceeds $1000	9		•
10. Total - Add Lines 8 and 9	10		
11. Less: Prepayments	11	•	•
12. Total - Subtract Line 11 from Line 10 - Indicate OVERPAYMENTS by ( )	12		
13a. Transfer credit from Column ____ to Column ____	13a	-	• - •
13b. Total - Subtract Line 13a from Line 12	13b	$	$
14. OVERPAYMENT — CREDIT to next year → / REFUND →	14	$ •	$ •
		•	•
15. TOTAL TAXES DUE - Line 12, Col. A plus Col. B, OR Line 13b, Col. A or B	15		•
16a. Interest - Compute on Line 15 minus First Installment, Line 9, Column B	16a		•
b. Additional Charge - Compute on Line 15 minus First Installment, Line 9, Column B	16b		•
17. BALANCE DUE - Add Lines 15, 16a and 16b — PAY →	17		$ •

CERTIFICATION OF AN ELECTED OFFICER OF THE CORPORATION

I hereby certify that this report, including any accompanying rider, is to the best of my knowledge and belief a true, correct and complete report.

Date | Signature of officer | Official title

Date | Signature of individual or name of firm preparing this report | Preparer's address

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SCHEDULE B – THIS SCHEDULE MAY BE LEFT BLANK IF THE CORPORATION DOES NOT CLAIM ALLOCATION –

PART I - Allocation - General Transportation Corporations - SECTION 183		AVERAGE VALUE FOR THE YEAR (a) New York	(b) Everywhere
18. Bills and accounts receivable	18	$	$
19. Shares of stock of other companies owned (attach list showing corporate name, shares held and actual value)	19		
20. Bonds, loans and other securities, exclusive of obligations of the United States, held, used or employed	20		
21. Leaseholds	21		
22. Real Estate owned	22		
23. All other assets (except cash and investments in U.S. obligations)	23		
24. Total: Add Lines 18 through 23	24	$	$
25. Allocation percentage, Line 24, Column (a) ÷ (b)	25	%	
PART II - Allocation - Aviation Corporations ONLY		(a) New York	(b) Everywhere
26. Revenue aircraft arrivals and departures	26		
27. New York percentage: Column (a) ÷ Column (b)	27	%	
28. Revenue tons handled	28		
29. New York Percentage: Column (a) ÷ Column (b)	29	%	
30. Originating revenue	30	$	$
31. New York percentage: Column (a) ÷ Column (b)	31	%	
32. Total –Add Lines 27, 29 and 31	32	%	
33. Allocation percentage: Line 32, divided by three	33	%	
PART III Allocation for Corporations Operating Vessels in Foreign Commerce - SECTION 183		(a) New York Territorial Waters	(b) Everywhere
34. Aggregate number of working days	34		
35. Allocation percentage: Line 34, Column (a) ÷ Column (b)	35	%	

SCHEDULE C - ASSETS AND LIABILITIES		(a) Beginning of Year	(b) End of Year
36. TOTAL ASSETS	36		
37. Total liabilities	37		
38. Capital stock: (a) Preferred stock	38a		
(b) Common stock	38b		
39. Paid-in or capital surplus	39		
40. Retained earnings (appropriated or unappropriated)	41		
41. Less cost of treasury stock	41		
42. TOTAL LIABILITIES AND CAPITAL	42		

SCHEDULE D - RECONCILIATION OF RETAINED EARNINGS

43. Balance beginning of year	43	
44. Net income - attach Profit and Loss Statement	44	
45. Other additions - explain	45	
46. TOTAL	46	
47. Dividends	47	
48. Other deductions - explain	48	
49. TOTAL dividends and other deductions	49	
50. Balance end of year	50	

51. Did this corporation during the year purchase any of its Capital Stock?

☐ Yes ☐ No

If "Yes", attach rider showing number and kind of shares, consideration received for the issuance of such shares and purchase price of each share.

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CT-183/184 Page 3

SCHEDULE E - COMPUTATION OF TAX BASED ON THE "NET VALUE" OF ISSUED CAPITAL STOCK

(a) Class of STOCK	(b) Number of Shares at year end	(c) PAR VALUE	(d) Amount paid in on Each Share	(e) Selling Price During Year High	(e) Selling Price During Year Low	(f) Average Selling Price	(g) NET VALUE Col. (b) X Col. (f)
Common		$		$	$	$	$
Preferred		$		$	$	$	$
NO PAR VALUE			$	$	$	$	$
52. Total					TOTAL NET VALUE →		$

53. Number of shares of Issued Stock, Line 52, Column (b) X $5.00	53	$
54. Taxable Base: Line 53 X _____ % from Schedule B, Line 25, 33 or 35	54	
55. Tax: Line 54 X .0015 (1½ Mills)	55	
56. Net value of issued Capital Stock, Line 52, Column (g)	56	
57. Taxable Base: Line 56 X _____ % from Schedule B, Line 25, 33 or 35	57	
58. Tax: Line 57 X .0015 (1½ Mills)	58	
59. Net Worth - year end Assets minus year end Liabilities - Schedule C, Col. (b)	59	
60. Taxable Base: Line 59 X _____ % from Schedule B, Line 25, 33 or 35	60	
61. Tax: Line 60 X .0015 (1½ Mills)	61	
62. TAX ON ALLOCATED ISSUED CAPITAL STOCK Largest of Lines 55, 58 or 61) - Enter in Schedule A, Line 1	62	$

SCHEDULE F - COMPUTATION OF TAX IF DIVIDEND RATE IS 6% OR MORE. ALL CORPORATIONS EXCEPT THOSE OPERATING VESSELS IN FOREIGN COMMERCE COMPLETE PARTS I AND II.

PART I - Tax Rate Computation based on Dividends Paid during the year

(a) Class of Stock	(b) Value of Stock on which Dividends were paid	(c) Dividends Paid	(d) Dividend Rate (c) ÷ (b)	(e) Tax Rate Computation - If Column (d) is 6% or more, multiply each percent in Column (d) by .000375 (3/8 of a Mill)
63. Common	$	$	%	Mills; enter at Line 69
64. Preferred	$	$	%	Mills; enter at Line 72
65. No Par Value	$	$	%	Mills; enter at Line 75
66. TOTAL →	$			

PART II - Tax Computation

67. Par Value Common Stock - Line 63, Column (b)	67	$
68. Taxable Base: Line 67 X _____ % from Schedule B, Line 25 or 33	68	
69. Tax: Taxable Base, Line 68 X Tax Rate _____ Mills, Line 63, Column (e)	69	
70. Par Value Preferred Stock - Line 64, Column (b)	70	
71. Taxable Base: Line 70 X _____ % from Schedule B, Line 25 or 33	71	
72. Tax: Taxable Base, Line 71 X Tax Rate _____ Mills, Line 64, Column (e)	72	
73. Amount paid in on No Par Value Stock - Line 65, Column (b)	73	
74. Taxable Base: Line 73 X _____ % from Schedule B, Line 25 or 33	74	
75. Tax: Taxable Base, Line 74 X Tax Rate _____ Mills, Line 65, Column (e)	75	
76. Total Value of Stockholder Equity	76	
77. Capital Subject to tax on Dividends (Lines 67, 70, and 73)	77	
78. Capital Not Previously Taxed (Line 76 minus Line 77)	78	
79. Taxable Base: Line 78 X _____ % from Schedule B, Line 25 or 33	79	
80. Tax: Line 79 X .0015 (1½ Mills)	80	
81. TOTAL TAX: Add Lines 69, 72, 75 and 80. Enter at Schedule A, Line 2	81	$

CORPORATIONS OPERATING VESSELS IN FOREIGN COMMERCE

PART III - Tax Rate Computation based on Dividends Paid during the year

(a) Paid in Capital	(b) Dividends Paid	(c) Dividend Rate (b) ÷ (a)	(d) Tax Rate Computation - If Column (c) is 6% or more, multiply each percent in Column (c) by .000375 (3/8 of a Mill)
82.	$	%	Mills; enter at Line 85

PART IV - Tax Computation

83. Paid in Capital - Line 82, Column (a)	83	$
84. Taxable Base: Line 83 X _____ % from Schedule B, Line 35	84	$
85. Tax: Taxable Base, Line 84 X Tax Rate _____ Mills, Line 82, Column (d)	85	$

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SCHEDULE G - MILEAGE ALLOCATION - SECTION 184

		(a) New York	(b) Everywhere
86. Mileage	86		
87. Allocation Percentage - Line 86, column a ÷ column b	87		

SCHEDULE H - TAX COMPUTATION BASED ON GROSS EARNINGS FROM BUSINESS IN NEW YORK STATE, SECTION 184

		GROSS RECEIPTS		ALLOCATION %	
88. Gross Receipts from business and other sources (Total per Federal Return)	88				
Gross Receipts from transportation and transmission allocated to NYS					
89. Trucking	89	$	X	%	
90. Pipeline	90	$	X	%	
91. Aviation	91	$	X	%	
92. Messenger Service	92	$	X	%	
93. Telephone and Telegraph	93	$	X	%	
94. Television Antenna and Cable TV System	94	$	X	%	
95. Water Transportation - Gross Receipts from transportation services originating and terminating within New York State - attach rider	95				
96. Railroad Transportation - Gross Receipts from transportation services originating and terminating within New York State - attach rider	96				
Gross Receipts from other sources					
97. Rental Income from use of real or tangible personal property within New York State	97				
98. Interest Income from assets held, used or employed in New York State	98				
99. Dividends from companies doing business wholly in New York State	99				
100. Dividends from companies doing business within and without New York State apportioned on the basis of Physical Assets within and without New York State – attach schedule	100				
101. Capital Gains from sale or exchange (see instructions)	101				
102. Gross receipts from all other sources within New York State	102				
103. Total Gross Earnings allocated to New York State - add Lines 89 through 102	103				
104. Tax - Line 103 X .0075 - enter at Line 4, Schedule A	104				

SCHEDULE I - ANNUAL TAX ON DIVIDENDS - IF THIS IS A SUBWAY, RAILROAD, ELEVATED RAILROAD, OR SURFACE RAILROAD NOT OPERATED BY STEAM WHOSE PROPERTY IS LEASED TO ANOTHER RAILROAD, THE FOLLOWING ITEMS MUST BE COMPLETED FOR THE PERIOD BEGINNING JANUARY 1, 1982 AND ENDING DECEMBER 31, 1982.

105. Name of Corporation to whom leased	106	
106. Amount of Capital Stock on which dividends were paid	107	
107. Total amount of dividends paid	108	
108. Dividend rate percent, per annum - Line 107 ÷ Line 106	109	
109. Amount of dividends paid in excess of 4% dividend rate	110	
110. Tax on dividends - Line 109 X 4.5% (Enter at Schedule A, Line 5)		

Composition of Prepayments Claimed at Line 11, Schedule A

	Date	Section 183	Section 184	DEPOSIT SERIAL NUMBER
A. Mandatory First Installment		$	$	
B. CT-400 Installments - Due June				
Due Sept.				
Due Dec.				
C. Payment with extension CT-180.1				
D. Credit from Prior Year(s)				
E. Total A, B, C and D Amounts shown at Line 11, Schedule A		$	$	

A COPY OF YOUR FEDERAL RETURN - PAGES 1 AND 4 MUST ACCOMPANY THIS REPORT

CT-183/184I (12/82) STATE OF NEW YORK - DEPARTMENT OF TAXATION AND FINANCE

INSTRUCTIONS FOR FORM CT-183/184

FRANCHISE TAX REPORT ON CAPITAL STOCK AND GROSS EARNINGS BY TRANSPORTATION AND TRANSMISSION CORPORATIONS AND ASSOCIATIONS

RECENT LAW CHANGE

Amendments to Section 3 of Article 1 of the Tax Law subject domestic corporations exclusively engaged in the operation of aircraft in foreign commerce to tax under Sections 183 and 184 of the Tax Law for all taxable periods beginning on or after January 1, 1981.

All corporations engaged exclusively in the operation of vessels in foreign commerce are exempt from all taxation for New York State and local purposes on their capital stock, franchises and earnings.

Other legislation amended the jurisdictional standards of Sections 183 and 184 of Article 9 to conform with the jurisdictional standards under Article 9-A. Some foreign corporations previously exempt are now taxable under Sections 183 and 184 of Article 9 if the corporation does business, employs capital, owns or leases property, or maintains an office in New York State. Gross earnings of an interstate character are no longer exempt from tax under Section 184 of the Tax Law.

For taxable years beginning on or after January 1, 1981, the tax under Section 184 of Article 9 does not apply to a railroad, palace car or sleeping car company, or to a navigation, canal, ferry (unless operating between New York City boroughs under a city lease), steamboat or other corporations operating vessels if the corporation's only activity in New York State is (1) maintaining an office and employing capital, and (2) owning property used exclusively in interstate or foreign commerce.

WHO MUST FILE FORM CT-183/184

Form CT-183/184 must be filed by every corporation, joint-stock company or association formed for or principally engaged in the aviation, railroad, canal, steamboat, express, navigation, pipeline, transfer, baggage express, trucking, telephone, telegraph, palace or sleeping car or ferry business and every other transportation or transmission business (except ferry companies operating between any of the boroughs of the City of New York, "omnibus corporations" and "taxicab corporations").

TAX BASIS

Article 9, Section 183, of the Tax Law provides for a franchise tax based on the net value of issued capital stock employed in New York State (see Schedule E).

The net value of issued capital stock may be allocated within and without New York. The allocation is based on the gross assets employed in New York (see Schedule B).

The franchise tax required to be paid under Section 183 is the highest tax computed by three methods.

1. Allocated value of issued capital stock multiplied by the tax rate of 1.5 mills (.0015)
2. Allocated value of issued capital stock multiplied by dividend rate in excess of 6%
3. Minimum tax of $75.00

A combination of tax on capital stock using the tax rate of 1.5 mills and the dividend rate as computed in Schedule F is possible if a corporation has more than one kind of stock.

Article 9, Section 184, provides for a tax at a rate of ¼ of 1% of the gross earnings received from business in New York State during the year. A railroad whose property is leased to another railroad must pay a tax of 4½% on dividends paid during the year in excess of 4% of the amount of its capital stock. The tax on gross receipts would not apply.

See Schedules G and H on page 4 of Form CT-183/184.

FOREIGN CORPORATIONS

License Fee

Foreign corporations must also file a report of license fee. See Form CT-240.

Maintenance Fee

Every foreign corporation authorized to do business in New York must pay an annual maintenance fee of $200. This fee may be applied against the taxes due under Article 9 except the license fee imposed by Section 181. If the total franchise taxes, excluding the installment of 1983, payable with your returns on Forms CT-183/184, CT-186A and CT-186P for December 31, 1982, exceed $200, you have satisfied the requirement to pay a maintenance fee. If the total taxes due, excluding the installments for 1983, are less than $200, add the amount needed to produce a total tax and maintenance fee of $200 on line 15 of Form CT-183/184.

Extension of Time for Filing Tax Report

A request for an extension of time to file a tax report must be filed on or before March 15, 1983 on Form CT-180.1.

An extension of time granted by IRS to file a federal return does not extend the due date for filing a New York State report.

SCHEDULE A

Line 1 - Enter tax computed in Schedule E and shown on line 62. This is the largest tax computed in Schedule E, based on the net value of allocated issued capital stock.

Line 2 - Enter tax from Schedule F, line 81 or line 85. This is the tax computed on dividends paid in excess of 6%.

Line 4 - Enter tax from Schedule H, line 104. This is the tax based on gross receipts.

Line 5 - Enter tax from Schedule I, line 110. This is an annual tax on dividends paid by a railroad whose property is leased to another railroad.

Line 6 - In Column A, enter largest of taxes shown in lines 1, 2 and 3.

Line 8 - In Column B, enter the amount on either line 4 or 5.

Line 7 - Columns A and B - A credit may be taken against your franchise tax for any "additional mortgage recording tax" paid by you. This credit may not reduce your tax below the minimum tax or, if you are an authorized foreign corporation, it may not reduce the tax below the $200 maintenance fee. Any unused credit may be carried forward. Attach Form CT-43, Claim for Additional Mortgage Recording Tax Credit.

Line 9 - If the tax shown on line 8, Column B, exceeds $1,000, a mandatory first installment is required for the period following that covered by this report. Show this installment on line 9 by entering 25% of the tax on line 8, Column B.

Line 11 - Prepayments to be entered in Column A or B include one or more of the following:

a. Mandatory first installment
b. Installment payments made with CT-400 forms
c. Credits transferred from prior years
d. Payments made with application for extension (CT-180.1)

Enter installments made under Section 184 in Column B only.

A schedule to assist you in the reconciliation of your prepayments is located on the bottom of page 4 of the form.

Line 12 - Enclose overpayments in parentheses:( ).

Line 13a - You may use an overpayment in one column to eliminate the tax due in the other column.

Line 15 - Foreign authorized corporations only: If the total taxes due with your franchise tax returns, CT-183/184, CT-186P and CT-186A, for December 31, 1982, total less than $200, add the difference to the tax due on this form and enter the total ($200) on this line. Attach rider showing computation. The additional mortgage recording tax credit may not reduce the maintenance fee below $200.

- Example -

Sec. 183, Minimum Tax, 12/31/82	$ 75.00
Sec. 184, Tax for 12/31/82	100.00
Total	175.00
Maintenance Fee for 1982	$ 200.00
Enter $200 at line 15.	

Line 16a - If you do not pay the tax on or before the due date (determined without regard to any extension), you must pay interest on the amount of the underpayment from the due date to the date paid.

The interest rate should be determined in accordance with part 603 of the Tax Regulations.

Line 16b - Additional charges:

- In case of failure to file a return when due, add to the tax, less any payments made on or before the due date, 5% per month up to 25%.
- In case of failure to pay the tax shown on the return, add to the tax, less any payments made, ½% per month up to 25%.
- The total of the two preceding additional charges may not exceed 5% for any one month.

Schedule B

Part I — General Transportation Corporations

Line 19 - If the assets of any company whose stock is owned by this corporation are employed both "IN" and "Outside" New York, an apportionment of your holdings may be made on the basis of percentage of employment by the issuer of the stock.

Line 20 - Bonds, loans and other securities are considered located where held.

Line 21 - Show all other assets except cash and investments in United States obligations.

Line 24 - The total of lines 18 through 23 (column b) must equal the amount of gross assets shown on the balance sheet of your federal return, except for cash and investments in United States obligations. Amounts shown in Column 2 should be the proportionate amounts for gross assets employed in New York State.

Part II — Aviation Corporations

Line 26 - "Aircraft arrivals and departures" means the number of landings and takeoffs of an aircraft and the number of aircraft pickups and deliveries. Arrivals and departures for maintenance, repair, refueling, training, emergencies, and nonrevenue flights should not be included on line 26.

Line 28 - "Revenue tons handled" means the weight in tons, of revenue passengers (at 200 pounds per passenger) and revenue cargo first received either as originating or connecting traffic or finally discharged at an airport.

Line 30 - "Originating revenue" means revenue from the transportation of revenue passengers and revenue property received as originating or connecting traffic.

Part III — Corporations Operating Vessels in Foreign Commerce

Line 34 - "Working days" means days during which a vessel is sufficiently manned for the transportation of persons or cargo or when it has cargo aboard. The working time in New York territorial waters and the working time everywhere shall be computed for each vessel in hours and minutes. At the end of the year, such time shall be totaled for all vessels and the sum coverted into days. Instead of records indicating actual time in New York territorial waters, time may be computed from records showing the time Ambrose Light Station was passed on the way in and out of port.

Schedules C and D

Information required in these two schedules must be the same information that appears on the balance sheet of your federal return. Attach a copy of your federal return.

Schedule E

Tax based on net value is the largest tax computed by the following three methods of valuing stock:

1. $5.00 per share of stock outstanding at year-end (lines 53 through 55).
2. The average selling price at which stock is sold during the year (lines 56 through 58).
3. The difference between the corporation's assets and liabilities (lines 59 through 61).

Schedule F

Part I

Compute the dividend rate on par value capital stock by using the par value of such stock. Do not include any "paid-in capital."

Compute the dividend rate on "no par value" stock by dividing the dividend paid by the amount paid for the stock. The amount "paid in" includes only the amount paid in for the stock (stated value of no par stock) and paid-in capital on such stock. It does not include capital arising from appreciation of assets, amounts not contributed by the stockholder or retained earnings.

Part II

If you paid a 6% or more dividend on all classes of issued capital stock, you need not complete lines 78 through 80.

If you did not pay a 6% dividend on all classes of stock, compute a tax on the dividend based on the value of the stock on which the dividend of 6% or more was paid plus a tax, at the "capital stock" rate, on the remaining value of all capital stock.

The remaining value of all capital stock depends on which class of capital stock the dividend was paid. If the dividend was paid on preferred stock, the remaining value of all capital stock is retained earnings plus common stock. If the dividend was paid on common stock, the remaining value of all capital stock is preferred stock. Retained earnings are normally associated with common stock. The following examples show how the dividend rates and remaining value of capital are computed:

Example 1: Dividend Paid on Preferred Stock

Par Value of Common Stock	$10,000	
Par Value of Preferred Stock	50,000	
Retained Earnings	80,000	
Dividend Paid on Preferred Stock	3,000	
Dividend Rate ($3,000 ÷ $50,000)	6%	
6 x .000375 (tax rate of ¾ mill)	.00225	
Tax ($50,000 x .00225)		$112.50
Remaining Value of Issued Capital Stock (common stock plus retained earnings: $80,000 x .0015)		138.00
Total Tax		$247.50

Example 2: Dividend Paid on Common Stock

Par Value of Common Stock	$10,000	
Par Value of Preferred Stock	50,000	
Retained Earnings	80,000	
Dividend Paid on Common Stock	3,000	
Dividend Rate ($3,000 ÷ $10,000)	30%	
30 x .000375 (tax rate of ¾ mill)	.01125	
Tax ($10,000 x .01125)		$112.50
Remaining Value of Issued Capital Stock (preferred stock only: $50,000 x .0015)		75.00
Total Tax		$187.50

Parts III and IV

Corporations operating vessels in foreign commerce must compute the dividend rate on "paid-in capital" for all classes of stock. This includes all amounts paid for the stock. It does not include capital from appreciation of assets, amounts not contributed by the stockholder or retained earnings.

Schedule G

All transportation and transmission corporations, except aviation corporations, corporations operating vessels or railroads and telephone and telegraph corporations must use this schedule to determine their mileage allocation. The mileage allocation is a percentage based on the number of revenue miles traveled within New York State compared to the total revenue miles traveled everywhere (nonrevenue miles, such as deadheading, should be excluded). The mileage allocation is used in Schedule H to compute the tax based on gross earnings from business activities in New York State.

Schedule H

Line 89 - Enter total gross receipts earned from trucking services everywhere and multiply by the mileage allocation percentage computed on line 87 of Schedule G.

Line 90 - Enter total gross receipts earned from pipeline services everywhere and multiply by the mileage allocation percentage computed on line 87 of Schedule G.

Line 91 - Enter total gross receipts earned from aviation services everywhere and multiply by the allocation percentage for aviation corporations computed on line 33 of Schedule B, Part II.

Line 92 - Enter total gross receipts earned from messenger services everywhere and multiply by the mileage allocation percentage computed on line 87 of Schedule G.

Line 93 - Telephone and telegraph corporations must allocate their gross earnings from transmission services. The allocation shall be based on gross operating revenue from transmission services performed wholly within New York State plus the portion of revenue from interstate and foreign transmission services attributable to New York State. A Taxpayer Service Bureau Memorandum, TSB-M-82(6)C, describes the method that must be used to allocate gross earnings attributable to New York State. The memorandum may be obtained from:

Taxpayer Assistance Bureau
Building 8, Room 915
State Campus
Albany, NY 12227
Telephone (518) 457-6803

Line 94 - Enter total gross receipts from television antenna and cable television systems services. If the antenna and all subscribers are located in New York State, 100% of the gross earnings must be allocated to New York State. Otherwise, gross receipts may be allocated on the basis of property within New York State compared to property everywhere.

Line 95 - Enter gross receipts from water transportation business originating and terminating within New York State. Receipts from business beginning and ending in New York State but passing through another state or country must be allocated within and without New York State include only that part of the revenue received from such business as the miles in New York State compare to the total miles. Attach a rider to show the computation of loop traffic allocation.

Line 96 - Enter gross receipts from railroad transportation business originating and terminating within New York State. Receipts from business beginning and ending in New York State but passing through another state or country must be allocated within and without New York State include only that part of the revenue received from such business as the miles in New York State compare to the total miles. Attach a rider to show computation of loop traffic allocation.

Line 98 - Interest income from assets, regardless of their physical location, should be included in gross receipts from business in New York State when the office of the corporation with management control over the assets is located in New York State. Interest earned on United States and New York State government securities is not taxable.

Line 101 - The profit on the sale of exchange of real or tangible personal property is computed on the basis of the original cost, not the depreicated cost, less any expenses iocurred in making the sale. Gains from the sale or exchange of United States and New York State government securities are taxable receipts and should be reported. Capital gains may not be reduced by capital losses.

Line 103 - Add lines 89 through 102 to obtain the total gross earnings allocated to New York State.

Line 104 - To compute the tax, multiply total gross earnings allocated to New York State on line 103 by tax rate of three quarters of one percent (.0075). Enter at line 4, Schedule A.

Schedule I

Line 107 - Enter dividends paid during the period from January 1, 1982, to December 31, 1982.

Composition of Prepayment Claimed at Line 11, Schedule A

It is not mandatory to provide this information. However, we are asking you to do so. If a discrepancy should arise between your records and ours, we could resolve it promptly with this information.